FILE COPY

FILED
JAN 10 1936
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

JOHN C. HIGGINS,
Solicitor for Appellants.

SULLIVAN & CROMWELL,
EDWARD J. MCGRATTY, JR.,
Of Counsel.

INDEX

PAGE

OPINION OF THE COURT BELOW 1

STATEMENT OF THE CASE 1

A. The Nature of the Case 1

General Importance of the Case 2

Attorney General's Change of Attitude 3

The Length of the Brief 4

B. General View of the Issues at the Trial and the Decision 4

1. Alleged Agreements to Raise and Maintain Prices and to Allocate Production and Territory 4

2. Alleged Purposes and Tendencies of the Defendants' Activities 5

SPECIFICATION OF THE ASSIGNED ERRORS 5

SUMMARY OF UNDERLYING ISSUES 6

ARGUMENT 7

I. THE PURPOSES AND GOOD FAITH OF DEFENDANTS IN FORMING THE INSTITUTE AND ADOPTING THE CODE OF ETHICS 7

A. The Findings as to Motives 7

The Mental Attitude of the Trial Judge 8

B. Pre-Institute Conditions—the Secret Concession System and Its Effect Upon the Industry 12

No Economic Basis for Concessions 17

The Tendency to Monopoly Among Distributors 18

Effects of Secret Concession System on Refiners 24

PAGE

C. Defendants' Purposes in the Formation of the Institute 30
Other Purposes in Forming the Institute 37
Wasteful Practices 38
Credit Bureau and Advertising 40

D. The Formation of the Institute and Relations with the Department of Justice 41

II. THE OPERATION AND EFFECT OF THE BASIC AGREEMENT THAT SUGAR SHOULD BE SOLD ONLY UPON OPEN PRICES AND TERMS, WITHOUT DISCRIMINATION AMONG CUSTOMERS 47

A. The Basic Agreement 47

B. Marketing System and Price Announcements before the Institute 48
Sugar "Moves" 48
A Completed "Move" 50
A "Spiked Move" 51
Little Sugar Purchased between "Moves" 52
"Moves" and Secret Concessions 54

C. The Price Reporting System of the Institute .. 55
The Only Innovation 56
No Price Comments or Propaganda by the Institute 58
The Three O'Clock Rule 58
"Repricing" 59
General Effects of Institute's Relaying Price Announcements 61
No Price Agreements or Collusion among Defendants 61

D. The Trial Court's Fundamental Error as to Price Announcements 62
Defendants did not in terms agree to sell only on prices and terms announced in ADVANCE OF SALES 63

PAGE

Announcements of Move Prices..... 63
Announcement of Day-to-Day Prices..... 64
The Institute continued under the move system, because it is a natural growth essential to the economic conduct of the sugar business..... 65
The Alternatives to the Move System..... 68
1. The Secret Concession System..... 68
2. The Trial Court's Proposed Remedy..... 70
(a) Would individual bargaining be more likely to develop if prices were announced after sales instead of before? 72
(b) Would a system of individual bargaining be economically more desirable than a system of general public offers to the trade?..... 75
The Trial Court's Two Remaining Arguments.. 83
E. Relative Prices and Profits in the Periods Before and During the Institute..... 89
The Alleged Higher Price Level..... 89
Price Inertia—"Lags" and "Leads"..... 90
Comparative Effects Where Raw Price Trends Are Reversed..... 92
The Unjustifiable Device Employed to Make the Institute Margin Appear Higher Than the Pre-Institute Margin..... 94
Further Reasons Which Destroy the Finding That the Institute Tended to Raise Prices.... 98
Refiners' Profits During the Institute Period and Before 100
The Result of the Above Figures..... 101
No Basis Stated by the Trial Court for the Finding that Margins or Profits Increased Under the Institute..... 103
Conclusion from Comparison of Pre-Institute and Institute Prices, Margins and Profits.... 104

PAGE

III. THE NATURE AND EFFECTS OF THE VARIOUS STEPS TAKEN BY THE DEFENDANTS TO MAKE THE OPERATION OF THE BASIC AGREEMENT EFFECTIVE 105

A. QUANTITY DISCOUNTS 105

No Saving in Direct Costs 107

No Saving in Indirect Costs 110

The Trial Court's Attempted Justification of Quantity Discounts in Certain Cases 114

Can Quantity Discounts Increase a Refiner's Production Enough to Reduce His Costs by an Amount Equal to the Discounts? 122

B. REGULATIONS AFFECTING BROKERS AND WAREHOUSEMEN 124

Code Provisions Affecting Brokers and Warehousemen 126

The Special Functions of the Broker and the Warehouseman in the Sugar Trade 127

Storage with Customers and Brokers 129

The Practice Before the Institute 133

The Court's Finding of an Improper Motive 134

Alleged Harsh and Arbitrary Methods 136

Alleged Special Cases 137

The Court's Proposed Alternative 138

The Edgar Example 141

Brokers and Warehouse Agreements 148

Paying Brokerage to Customers and Splitting Brokerage Fees 150

C. MISCELLANEOUS ACTIVITIES 152

(a) Damaged Sugar and Frozen Stocks 153

(b) Tolling 157

(c) Used Bag Allowances 164

(d) Private Brands 167

PAGE

(e) Long Term Contracts 170
1. The General Question 170
2. The Special Edgar Contracts 174
3. Contract Enforcement 177

(f) The Four Payment Plan, Split Billing, the Cash Discount, the Price Guarantee and Second Hand Sugar or Resales 179

(g) Transportation Activities 182
1. Transiting and Diversion 182
2. Water Carriers 187
3. Private Charters 190
4. Pool Cars and Pool Cargoes 191
5. Trucking 192

(h) Institute Investigations 195

IV. INSTITUTE ACTIVITIES DESIGNED TO EFFECT MORE ECONOMIC METHODS OF PRODUCTION AND DISTRIBUTION 196

A. The Institute's Statistical Service 196
Price Announcements 196
Freight Announcements 197
Melt, Deliveries and Stocks 197
Deliveries by States 198
Miscellaneous Statistics 198
The Court's Charge of Withholding Statistics ... 200

B. Consignment Points 206
Situation Prior to 1928 206
The Cost of Carrying Consigned Stocks 208
Consigned Stocks of No Real Value to the Trade 211
The Institute's Recommendations 216
Reconsignment Points and Ports of Entry 219
Liquidation of Consignment Stocks to be Discontinued 221
Summary 222

PAGE

V. DELIVERED PRICES 224

THE LAW 247

A. THE CONCERTED ADOPTION AND OBSERVANCE BY COMPETITORS OF THE PRINCIPLE OF SELLING THEIR PRODUCT ONLY UPON OPENLY ANNOUNCED PRICES AND TERMS WITHOUT SECRET DISCRIMINATIONS DOES NOT CONSTITUTE AN UNDUE OR UNREASONABLE RESTRAINT OF TRADE..... 249

(1) The practice of selling only upon open prices and terms without secret discriminations among customers is essential to the functioning of that type of competition which is beneficial to the public interest, and has been uniformly approved by the courts... 249

The *Steel* Case..... 249

The *Chicago Board of Trade* Case..... 251

The *Hardwood* and *Linseed* Cases..... 252

The *Maple Flooring* and *Cement* Cases.... 256

The *Appalachian* Case..... 260

(2) Section 2 of the Clayton Act condemns the type of secret discriminations that were practiced in the sugar industry before the Institute was formed, and the concert of action involved in the adoption and observance of this fundamental Code provision represents the only effective way of giving practical effect to the express mandate and the underlying policy of that Section..... 262

Special Grounds Justifying Discriminations.... 268

"Quantity" Discounts..... 269

Discriminations to Meet Competition..... 270

Further Reasons Supporting Lawfulness of Concerted Action Against Discriminations.. 274

PAGE

(3) The practice of selling only on publicly announced prices and terms without secret discriminations in favor of particular purchasers is the only practical means of protecting both sellers and buyers from the widespread deception and fraud which are an inevitable part of the practice of secret price discriminations 276

Section 5 of the Federal Trade Commission Act 278

B. THE STEPS TAKEN BY APPELLANTS TO GIVE EFFECT TO THE BASIC AGREEMENT THAT SUGAR SHOULD BE SOLD ONLY UPON OPEN PRICES AND TERMS WITHOUT DISCRIMINATION AMONG CUSTOMERS DID NOT CONSTITUTE AN UNDUE OR UNREASONABLE RESTRAINT OF TRADE 279

1. The Price Reporting System 279
2. Quantity Discounts 287
3. Regulations Affecting Brokers and Warehousemen 290
4. Miscellaneous activities designed to render effective the basic agreement that sugar should be sold only upon open prices and terms without discrimination among customers 292

C. THE ACTIVITIES OF DEFENDANTS DESIGNED TO EFFECT MORE ECONOMIC METHODS OF PRODUCTION AND DISTRIBUTION DID NOT CONSTITUTE AN UNDUE OR UNREASONABLE RESTRAINT OF TRADE ... 294

CONCLUSION 296

CITATIONS

CASES: PAGE

American Can Co. v. *Ludoga Canning Co.*, 44 Fed. (2d) 763; Certiorari denied 282 U. S. 899..... 264, 266-7, 274, 288, 289

American Column & Lumber Co. v. *United States*, 257 U. S. 377..58, 252, 253, 256, 257, 258, 261, 280, 281

Appalachian Coals Inc. v. *United States*, 288 U. S. 344, 248, 260-1, 262, 295

Cement Manufacturers Protective Association v. *United States*, 268 U. S. 588.....:.....73, 138, 205, 248, 256, 257, 259-60, 262, 278, 281, 282, 283, 295

Chicago Board of Trade v. *United States*, 246 U. S. 231 .....248, 251, 252, 260, 262

Maple Flooring Association v. *United States*, 268 U. S. 563...205, 248, 256, 257, 258, 262, 280, 281, 282-3, 295

Standard Fashion Co. v. *Magrane Houston Co.*, 258 U. S. 346 265

United States v. *American Linseed Oil Co.*, 262 U. S. 371.....252, 253, 254, 256, 257, 258, 261, 280, 281, 282

United States v. *United States Steel Corp.*, 223 Fed. 55; 251 U. S. 417 .....249, 250-1, 285

Van Camp & Sons v. *American Can Co.*, 278 U. S. 245 264

STATUTES:

PAGE

Clayton Act (38 Stat. 730) Sec. 2.....30, 31
41, 43, 176, 262-276, 287, 290

Federal Trade Commission Act (38 Stat. 717) Sec. 5
278, 279

Interstate Commerce Act (24 Stat. 379).....182, 189

Sherman Act (26 Stat. 209).....2, 30, 157, 224, 284

TEXT BOOKS:

"Biennial Census of Manufacturers for 1931", Bureau of Census, U. S. Dept. of Commerce..... 120

"Business Cycles", Wesley C. Mitchell..... 90

"Economic Principles and Problems", Sparr *et al*.... 91

"Statistical Methods", F. C. Mills..... 91

Supreme Court of the United States

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS.

Opinion of the Court Below.

The Opinion delivered by the Court below has not been reported, but appears at pages 86-263 of the Record.

STATEMENT OF THE CASE.

A. The Nature of the Case.

This is an appeal from a final Decree of the United States District Court for the Southern District of New York holding that the defendants had engaged in a combination and conspiracy to restrain interstate trade in sugar

in violation of the Sherman Anti-Trust Act. Some of the activities of the Sugar Institute and the other defendants complained against by the Government were found to be lawful, and other alleged unlawful activities were found not to have existed. The Sugar Institute and some of its activities were therefore allowed to continue but most of its activities were condemned and enjoined by the Trial Court.

The defendants were The Sugar Institute, Inc., a trade association composed of the fifteen principal American cane sugar refining companies, the companies themselves and various officers and directors of the Institute and the defendant companies. The appellants include all of the original defendants with the exception of two who died prior to the Decree, two as to whom the petition was dismissed, and defendants Rudolph Spreckels and Spreckels Sugar Corporation (in receivership since January 19, 1932), who did not join in the appeal.

The case involves the most elaborate legal test of the activities of a trade association ever undertaken by the Government. The great variety and extent of the issues presented are indicated by the following facts: The trial occupied approximately six months. The stenographic transcript of the oral testimony was 10,550 pages long, filling a total of nineteen volumes. Over a hundred witnesses from all parts of the country were called by the Government and the defense. More than 2,400 exhibits were received in evidence, ranging in length from one to several hundred pages. It required 256 separate Findings of Fact and Conclusions of Law to dispose of the issues presented, and the Opinion of the Court reviewing these issues occupies 175 pages of the Record.

General Importance of the Case. The case presents a number of fundamental Trade Association questions not

heretofore decided by this Court, and those questions have great importance at this time, because of the collapse of the Federal Government's attempt at trade regulation under the N. R. A. Commerce and industry are looking to this Court for guidance in determining what they may do to abolish destructive and dishonest trade abuses without being held guilty of violating the Federal Anti-Trust Laws.

Having no price-fixing or production control features, the fair trade provisions of the Code of Ethics adopted by the Sugar Institute represented a courageous and determined effort by the members of the sugar refining industry to eliminate the type of fraudulent and uneconomic trade practices sought to be abolished by the more moderate of the trade practice provisions of the Codes of Fair Competition actively fostered by the United States Government during the era of the N. R. A. We believe that effective self-regulation by concerted action, as carried on by the Sugar Institute, for the purpose of abolishing wasteful, uneconomic and dishonest practices, is entirely possible under the Anti-Trust Laws of the United States and by this appeal we ask this Court to so declare.

Attorney General's Change of Attitude. At the time the Sugar Institute was organized and in the early period of its operation, the Attorney General shared this belief with us. As the Record fully shows (pp. 41-6, *infra*), the Institute was organized and began its operations with the full cooperation of the Attorney General's office, and in a common effort to work out a Trade Association Code of Ethics which would remedy recognized evils without violation of the Anti-Trust Laws. After a change in the personnel of the office, the defendants were haled into court for having adopted and put into effect the identical Code of

Ethics the former Attorney General had approved and helped to frame. The Code had not changed, but the Attorney General's office had changed its mind with the change in personnel. We are now here to have this Court decide which Attorney General was right.

The Length of the Brief. Because of the great number and complexity of the issues of fact and the unusual size of the Record, this brief is necessarily very long. We have attempted to abbreviate it as much as possible and in so doing have had to abandon many of our Assignments of Error and omit the discussion of many issues altogether. The result represents a conscientious effort to present as short a brief as possible without thereby abandoning the more vital grounds in controversy.

B. General View of the Decision and the Issues at the Trial.

1. *Alleged Agreements to Raise and Maintain Prices and to Allocate Production and Territory.*

The Government charged that the defendants had agreed among themselves to raise and maintain prices, and to allocate production and territory, and had agreed with their competitors, the beet sugar manufacturers and the offshore sugar refiners, to maintain a differential between the defendants' cane sugar and the competing beet and offshore sugars. No substantial evidence was introduced to support these charges. The evidence to the contrary was overwhelming and conclusive, and the Court therefore found that there were no such agreements (Finding 201, R. 310; Findings 210-12, R. 313; Findings 14-16, R. 268-9).

2. Alleged Purposes and Tendencies of the Defendants' Activities.

The Government alleged that it was the purpose of the defendants in organizing the Institute and carrying on its activities to restrain competition and to raise and maintain prices, and that the activities of the defendants tended to and did produce those results. In general, the Court found with the Government on these charges.

We maintain that there is no substantial evidence to support the Findings as to unlawful purposes, or the Findings that the activities of the defendants tended to or did restrain lawful competition or raise or maintain prices. We contend that, on the contrary, the evidence shows conclusively that the purposes of the defendants were lawful and proper, and that, instead of suppressing or restraining competition, their activities promoted free and open and lawful competition, and did not have the effect of raising or maintaining prices, or the tendency to do so.

SPECIFICATION OF THE ASSIGNED ERRORS.

The errors originally assigned by appellants were 217 in number and cover thirty pages of the Record (R. 328-58).

Assignments 103 to 127, inclusive, covering all of appellants' assigned errors in connection with the admission or exclusion of evidence, and most of which were omitted by appellants when filing their Statement of Points to be Relied Upon, are disregarded entirely in this brief.

In an endeavor further to reduce the number of issues to be presented on this appeal, the following additional Assignments are disregarded: Nos. 3, 13, 22, 23, 24, 29,

30, 31, 34, 35, 37, 47, 49, 57, 64, 65, 68, 83, 84, 85, 86, 87 and 94; the following subdivisions of Assignment 129: (6), (12), (13), (15), (20), (22), (28), (29), (30), (31) and (34); and the following subdivisions of Assignment 136: (6), (9), (17), (18), (19), (20), (21), (26), (27), (29), (30), (36), (37), (38), (41), (42) and (43). Most of the Assignments just enumerated relate to things which the appellants deny having done, and which they have no intention or desire to do in the future, and the others relate to matters which are not material to the major issues which appellants desire to present for review.

The remaining Assignments, 141 in number, are all material to the issues presented in this brief and are designated and discussed under the subject headings to which they relate. Since it would serve no useful purpose to extend this brief by printing them here, we have included them in the Appendix.

SUMMARY OF UNDERLYING ISSUES.

The underlying facts in the case are substantially undisputed. The issues on this appeal arise almost wholly out of inferences and conclusions embodied in the Findings and drawn by the Trial Court from admitted facts. The Findings are very numerous but they present a few broad and underlying issues substantially decisive of the entire case, which can be fully analyzed and discussed in a brief and argument not excessively long. What we deem these underlying and decisive issues to be is indicated in the following general outline of them:

1. The purposes and good faith of defendants in the formation of the Institute and the adoption of the Code of Ethics.

2. (a) The nature and legality of the basic agreement that sugar should be sold only upon open prices and terms, publicly announced, without discrimination among customers; (b) the effect of the open competitive conditions fostered by the Institute on the level of sugar prices and profits; (c) the necessity, reasonableness and legality of the various steps taken by defendants to make the operation of the basic agreement effective.

3. The nature and legality of those activities designed to effect more economic methods of production and distribution.

Order of Discussion. We will discuss first the facts material to the various issues, pointing out what we believe to be the erroneous inferences and conclusions from those facts drawn by the Trial Court and embodied in the Findings, and will then discuss the applicable law in the concluding section of the brief.

ARGUMENT.

I.

THE PURPOSES AND GOOD FAITH OF DEFENDANTS IN FORMING THE INSTITUTE AND ADOPTING THE CODE OF ETHICS.

A. The Findings as to Motives.

We do not believe the Trial Judge's decision in this case can properly be rested upon his attempt to evaluate

the different motives of the defendants. Throughout his Findings, he sets out certain admitted and lawful purposes of the defendants in their various activities, and then proceeds to find that they had an additional purpose, which he characterizes as dominant and unlawful.

The Mental Attitude of the Trial Judge. Before proceeding with our analysis of the facts and detailed discussion of the issues, we think it is proper to make certain statements about the mental attitude of the Trial Judge, especially as reflected by his Findings as to motives. These statements will later be supported by specific references to the Record. In making the statements, we want to make it plain that they do not imply any lack of confidence in the complete integrity of the Trial Judge. No judge could have been consciously fairer to both the defense and the Government. But nevertheless, we believe, and we think the Record supports our belief, that the Trial Court's decision as to the defendants' motives, and also as to many of the other and really important issues of fact in the case, was based not on the evidence but on the Court's own preconceived economic views and his apparently complete distrust of business men and their motives. The defendants were often condemned, not so much for what they did, as for a *suspected* improper motive in doing it.

We believe it is clear from the Record that the Trial Court approached the case with the conviction that unrestrained competition is socially desirable, that every concerted effort to restrict or regulate such competition is to be viewed with distrust, and that the professed purposes of members of an industry participating in such an effort are not to be believed. The nature of the Opinion and the Findings of Fact was the inevitable result of the defend-

ants' inability to alter or modify this underlying social and economic philosophy of the Trial Court.

The key to the entire Opinion and Findings lies in Findings 35 and 36 (R. 273):

> "35. Among the purposes of the defendants in organizing the Institute were: (a) the selling of sugar on open, publicly announced prices, terms, and conditions; (b) the gathering of trade statistics not previously available; (c) the elimination of practices which they deemed wasteful; and (d) the institution of an advertising campaign to increase consumption. But these purposes were for the most part only incidental to defendants' actual dominant purposes in forming and operating under the Institute.
>
> "36. I find that defendants' dominant purposes in organizing the Institute were: to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves and other competitors; to maintain relatively high prices for refined, as compared with contemporary prices of raw sugar; to improve their own financial position by limiting and suppressing numerous contract terms and conditions; and to make as certain as possible that no secret concessions should be granted."

Having found from the evidence that defendants had certain disclosed and lawful motives in organizing the Institute, the Court then, by some process of inference and evaluation not revealed in the Record, proceeds to find certain additional and undisclosed motives, which he characterizes as "dominant". No evidence is cited as showing either the existence or the alleged dominance of those motives,

and there is in fact no such evidence. They are apparently mere projections of the Court's suspicions of the general motives of business men. Characterizing these suspected underlying motives as selfish and unlawful, and as predominating over the admitted lawful motives, the Trial Court then viewed each specific activity thereafter undertaken by the Institute or its members in the light of this preliminary and basic Finding of illegality of original purpose.

Inevitably, and almost without exception, the Court thereafter found an undisclosed and illegal motive or purpose in nearly every provision or interpretation of the Code of Ethics, in nearly every ruling, recommendation and activity, rejecting each time the purpose alleged and testified to by defendants. Almost without exception these Findings impugning the motives, purposes and good faith of defendants are entirely unsupported by any evidence introduced by the Government. They are moreover squarely in conflict with the unanimous and uncontradicted testimony of the defendants.

The vice that runs all through the Trial Judge's decision is that he gives greater weight to his suspicions than to the evidence. He says, for example, that the combination of the brokerage, warehousing and merchandising functions led to dishonesty by approximately fifty per cent. of the distributors (Opinion, R. 113-4), and that to stop this dishonesty was one of the motives of the refiners in requiring a separation of those functions, but he condemns that action because he *suspects* that one of their motives was to *maintain a uniform price structure* (Finding 79, R. 284). His Finding on this point is as follows:

> "79. Defendants' purposes in compelling the separation of occupations were: (a) to assure the

> refiners, distrustful of one another, that no one of them could successfully use such combination to facilitate secret concessions; (b) to prevent fraudulent practices by the distribution agencies in their dealings with and on behalf of the refiners; and, most important, (c) to aid in preserving the uniformity of price structure which they aimed to maintain."

And yet he also finds that uniform prices are to be expected under a regime of free competition in a standardized commodity such as sugar (Opinion, R. 221; Finding 17, R. 269), and that, in the years of absolutely unrestrained competition before the Institute, prices were uniform except for the concealed concessions which were given to favored customers (Opinion, R. 220-22; Finding 17, R. 269), and which the Court admits were evil and uneconomic (Opinion, R. 95; Finding 29, R.271). The Court's reasoning is therefore nullified by his suspicions.

It is impossible to understand why he should condemn defendants' action in separating the functions of brokerage, warehousing and merchandising on the ground that he suspected that one of their motives was to maintain a uniform price structure, when he found their other motives to be proper, and when he also found that uniform prices were to be expected under a regime of free competition and that prices were uniform in the years of unrestrained competition before the Institute, except for the evil and uneconomic secret concessions which were given to favored customers.

What we believe to be this inherent conviction of the Trial Court that any regulation of competition by the competitors themselves is to be distrusted and therefore condemned is clearly evidenced by repeated Findings with respect to matters involving the exercise of economic or

business judgment. Time and again the Trial Court found that, contrary to the uncontradicted testimony of defendants, steps taken by defendants to correct admitted evils and abuses were not reasonably necessary to accomplish the purpose intended. In instance after instance the Trial Court found that admitted evils and abuses could have been eliminated by a method proposed by the Court, which Findings are not only wholly unsupported by the evidence but are contrary to the manifest results of experience as testified to by defendants.

Furthermore, in the application of legal principles to the facts of the case, the Trial Court adopted a completely inflexible and reactionary interpretation of the Federal Anti-Trust Laws and the decisions of this Court with respect thereto. Almost without exception, the Trial Court found to be illegal every phase of Institute activity which had not theretofore been expressly and specifically approved by this Court. We believe that in the decision of the case the Trial Court proceeded upon a fundamentally erroneous conception of the purpose and effect of the Federal Anti-Trust Laws and of the principles to be applied in the interpretation and application thereof as previously declared by this Court.

B. Pre-Institute Conditions—the Secret Concession System and Its Effect Upon the Industry.

The sugar industry has always *pretended* to be one in which the product was sold on open prices publicly announced. It has always been the practice of the refiners to announce their prices from time to time and these prices purported to be those which all purchasers were required to pay. The historic system of sugar "moves" hereafter

described (pp. 48-55, *infra*), under which the great bulk of refined sugar has always been sold, is based squarely on the principle of open price announcements.

During the years 1917-1919, which were a period of Government control of the sugar industry, the United States Food Administrator required the refiners to sell only on openly announced prices, and secret concessions, rebates and all forms of discrimination were forbidden (R. 588).

Beginning perhaps as early as 1921 and increasingly thereafter, the practice developed on the part of some refiners of giving secret concessions from their published prices. Although the infection spread, it did not become universal. It had the effect of dividing the industry into two camps. One group, the so-called "ethical" refiners, consisting of Arbuckle, California & Hawaiian, Henderson, Revere and Western, adhered to the open-price policy. The other group, the so-called "unethical" refiners, embracing all the others, gave secret concessions from their open prices for the benefit of special customers (Finding 20, R. 269-70). In 1927, the year before the Sugar Institute was formed, the ethical refiners did about 25% of the total sugar business, while the unethical refiners did about 75% of it (Ex. Y-14), and at least 30% of all the sugar sold by refiners carried some kind of secret concession (Finding 20, R. 269-70).

The principal attribute of the concession system to which this second group of refiners became addicted was the *secrecy* of the concessions. The recipient of the concession did not want or demand the concession merely in order to lower his sugar cost, but mainly in order to secure a preferred position over his competitors who did not receive a concession, or so large a one. He wanted to be

placed in a position where he had some advantage over his competitors so that, while still keeping a sugar profit for himself, he could undersell them and thereby influence the trade in his favor and compel his competitors to accept the choice of selling at a loss or no longer selling sugar. It was the essence of the arrangement, if the favored customer was to derive the advantage he contemplated, that the concession be kept *secret,* so that his competitors would not know he was getting an inside cut, or the extent of it, and thus be equipped to compel the refiner to grant them similar concessions. The refiner, of course, wanted to keep the concessions secret in order to prevent his competitors from meeting his concessions with similar or larger ones, and in order to forestall similar demands from his other customers (Finding 21, R. 270).

This whole secret concession system was not only unfair and dishonest, but it was a complete negation of free and economic competition. Its purpose was to *prevent* competition, by deceiving the refiner's competitors as to the prices and terms they had to meet in making sales, by deceiving the concessionaires' competitors as to the prices and terms available in their purchases, and by rendering them helpless to meet the resale prices of the concessionaires. Its result was a progressive demoralization of the entire sugar trade. Competition was carried on by stealth and false pretense, and concessions in prices and terms which should have been publicly extended to everyone, if given at all, were confined to favored insiders, who were thus enabled to take business away from the great majority of the refiners' customers who did not enjoy these discriminatory advantages and did not know they were being given to their competitors.

On account of the necessity for secrecy, the concessions took various subterranean forms, as devious as could be contrived by the minds which thought them up. Probably no one knows all of the forms which the concessions took. A few of the outstanding ones may be enumerated—a simple secret rebate in price; payment of fictitious "brokerage" to the customer or to a dummy designated by the customer; payment of fictitious "storage" charges in respect of sugar sold and delivered to the customer; fictitious advertising allowances; secret substitution of higher priced grades and packages for the grades specified in the contract; special credit terms through delayed and split billing; secret payment or absorption of trucking or switching charges; secretly reduced transportation charges on deliveries out of consignment; secret options to buyers to increase, after a price advance, the quantity of sugar bought at a lower price before the advance; sales under falsely labelled "export" contracts for domestic use (R. 598-603; 1036-7, 1061-2).

One method of handling concessions was described by the Government's witness Smith, who explained that while the refiners billed his company for their regular published freight applications, he would in turn bill them back once a month for an agreed amount of rebate, so that if one of the refiner's bills to his company should fall into the hands of a competitor, the competitor would not know that a rebate on transportation charges was being given (R. 404).

Another method was described by the witness Symons, who explained that in his situation he received a confidential rebate in the form of a check sent to him periodically by the refiner (R. 1002).

American usually paid its concessions in the form of checks to its special customers sent some time after the sale, generally quarterly, sometimes monthly (R. 1102). The rebate was not specified in the contract but was covered by an oral arrangement between the refiner and the customer; and, of course, American did not allow its other customers to know that these concessions were being given. The entire handling of these concessions was kept as secret as possible—they were authorized by informal memoranda delivered by the sales manager to a confidential clerk in the accounting department, the vouchers did not disclose the nature of the payment, and "knowledge of them was confined to just as few people as it was reasonably possible to confine it to and carry on our business" (R. 1036; 1101-2).

National endeavored to keep its concessions under cover by permitting only one man in its accounting department to handle them, in order that the information might be kept "as secret as possible" (R. 1071-2). Post, National's President, testified that National's concessions were given neither openly nor generally to customers—every effort was made to keep them secret and confidential (R. 1061).

Although McCahan at first attempted to have its contracts with customers express the actual price for the sugar, it had to abandon this procedure because it became difficult to keep the prices confidential. McCahan therefore adopted the practice of omitting any reference to a concession in the contract and of taking care of the customer by some rebate subsequent to invoicing and payment. Placé testified, "we expected the customer to keep it confidential. I believe that in practically every case they did so because it was to their advantage" (R. 1152-3).

One refiner insisted that any customer with whom it "stored" create a name for his so-called warehouse so that the sugar might be consigned nominally to this warehouse rather than to the customer—all for the sake of appearances—to avoid an outward show of storing with customers, in order that other customers would not know the actual facts and could rest under the delusion that the warehouse was really a "warehouse" and not a "set-up" by which a customer got a rebate through payment to him of alleged storage charges on his own sugar, or on the refiner's sugar held in the customer's premises for the customer's use and benefit (R. 864).

The Trial Court summarized the facts as to the secret concession system in Finding of Fact 29, as follows (R. 271-2):

> "29. The industry was characterized by highly unfair and otherwise uneconomic competitive conditions. Arbitrary, secret rebates and concessions were extensively granted by the majority of the companies in most of the important market areas and the widespread knowledge of market conditions necessary for intelligent, fair competition were lacking. The refiners were disturbed economically and morally over the then prevailing conditions. At least one refiner, American, was concerned about the possibility of liability under the Clayton Act because of the discriminations resulting from the various concessions."

No Economic Basis for Concessions.

The system of giving concessions was neither logical nor ethical. There was no classification of customers or concessions based on reason or fairness or economic con-

siderations. Quantity, as such, had nothing to do with it. Although generally the larger buyers got the lion's share of these secret concessions, some of the large buyers got no concessions at all, while some of the small buyers succeeded in "chiselling" out for themselves larger concessions than large buyers (Ex. D-10, E-10, G-10; R. 965, 972, 937, Findings 24 and 156, R. 270, 301-2).

The only considerations were the plausibility and force of the buyer's representations and threats, and what the refiner *guessed* his competition was. The concessions were measured by the buyer's ability to make the refiner believe that such concessions were necessary to secure or hold his business, and by the ability of the refiner to make the buyer believe he was getting the most favored treatment. No buyer could rely on the word of a refiner, no refiner on the word of a buyer, and no refiner on the word of another refiner (R. 383, 597-8, 680, 688-9, 700, 716-7, 883, 992, 1065). Discriminations prevailed throughout the industry —not difference in prices or terms based on any fair or reasonable distinction between customers—but discriminations which were arbitrary and unfair and uneconomic, and which led to lying and cheating and utter demoralization of the trade (R. 597-9, 716-7, 883, 1034, 1060).

The Tendency to Monopoly Among Distributors.

The necessary and inevitable effect of the viciously discriminatory concession system was the promotion of monopoly on the part of those concerns which were the beneficiaries thereof. Such a result was so logical and unescapable that the Finding of the Trial Court that "there is no substantial evidence that secret concessions and fraudulent

practices did or would lead to monopolies among the distribution agencies" is almost incomprehensible, especially in view of the Court's own statement in its Opinion that "It may well be that such discriminatory concessions tend to create territorial monopolies in sugar distribution" (R. 94). Even in the absence of specific evidence on the point it is obvious that such a consequence was inherent in the very nature of the system. But specific evidence was not lacking.

Government witness Smith of Johannes Brothers, wholesale grocers operating throughout Wisconsin and Michigan, who enjoyed a concession of 5c to 8c a bag from National, as well as the advantages of "warehousing", testified that the system of concessions enabled wholesalers who could give their customers a 5c or 10c advantage in the price of sugar to take away from their competitors "a large share of the grocery business because sugar is used as a football in price" (R. 396), that "the only advantage in handling sugar is for the purpose of boosting the rest of the business" and that "it is a consistent practice to offer an inside price on sugar for the purpose of getting the grocer to buy other lines" (R. 399).

Another Government witness, O'Riley, of the Chicago Sugar Company, who complained because the discriminatory advantages which he had enjoyed before the Institute had been taken away, complained even more bitterly during the period when Edgar, the Government's chief witness, enjoyed advantages over him "through warehouse and other allowances". He stated that these practices "are not only placing us at a disadvantage in competition and seriously injuring our business but if continued will necessarily remove us as an avenue of distribution" (Ex. I).

Peterson, Vice-President of the National Association of Retail Grocers, testified that, during the years 1925, 1926

and 1927, his concern did not push sugar because "there was not enough profit to pay our overhead expenses" since "the chain stores in many cases sold for less than the price at which we could buy" (R. 817-8).

Kamper, a retail grocer of Atlanta, Georgia, and former President of the National Association of Retail Grocers, testified that in the years 1926 and 1927 he could not meet the prices quoted by C. D. Kenny Company, A. & P. and Piggly-Wiggly, which organizations were constantly featuring sugar at cut prices, frequently less than the cost to his concern (R. 1006). Heimer, of the same C. D. Kenny Company, was one of the Government witnesses who protested vehemently because, since the formation of the Institute, he "could no longer get any deals or anything else" (R. 513).

Duncan, a wholesale grocer of Davenport, Iowa, whose concern was accustomed to sell 25,000 bags a year, saw his sales drop to one-third of that amount because of underselling by the Edgar organization, which by reason of the concessions which it enjoyed was able to sell to retailers at the refiners' basis price to wholesalers, and practically drove the other merchants out of business.

> "* * * From March, 1927 until January 1, 1930, they sold direct to the retail trade at our cost. We did not meet Edgar's price. As a result of Edgar being in the market he sold practically all the sugar. Our sales went way down" (R. 1009).

Symons, a wholesale grocer of Saginaw, Michigan, and former President of the Michigan Wholesale Grocers Association, testified that his concern "could not profitably compete" with Edgar, whose prices were "pretty close to our costs" (R. 1003). "The situation that was developing

in our state had a monopolistic tendency and was putting the ordinary wholesaler out of the sugar business and if something could not be done to stop it, we would be at a very serious disadvantage" (R. 1004). In 1927, Symons made a trip to New York for the purpose of taking up with the refiners in person a resolution adopted by the Michigan Wholesale Grocers Association:

> "WHEREAS, there has grown up within the trade of late a practice whereby it is possible for some distributors to act in the capacity of refiner's agent, or broker, wholesaler, warehouse proprietor and in isolated cases, in the capacity of retailer, therefore be it
>
> "RESOLVED, the refiners marketing their product in this manner are discriminating against the wholesale sugar trade in general, that such discrimination is both unethical and unfair, that it tends to concentrate the sugar business in few hands and that this tendency toward monopoly will eventually react against the best interests of the refiner, the retailer and the consuming public" (R. 1003-4; Ex. A-8).

Worcester, Vice-President of Revere, one of the ethical refiners, describing conditions in the industry prior to the formation of the Institute, testified:

> "We had all kinds of complaints from our customers. They complained they were not able to compete on even terms with those who were receiving various kinds of concessions and threatened to stop buying from us unless we met them" (R. 689).

Cummings summed up the situation as follows:

> "The trade was making complaints about the effect of the discriminatory concessions. The small

> dealer complained that he was being put out of business and the bigger competitor was monopolizing the customers which he had had in the particular locality and making it impossible for him to conduct that part of his business which pertained to the sale of sugar. These complaints were coming in in increasing volume to my company, Warner Sugar Company, up to the time it went out of business in 1927. They came from all parts of the country and were discussed at great length at the meetings of the refiners and resulted in the organization of the Institute" (R. 604). "* * * The substance of what they said with regard to that particular matter was that the complaints of customers evidenced that some customers were getting monopolies of trade and territories at the expense of others who were being put out of business because of the superior advantages given to their competitors" (R. 605).

Independent retailers could not compete with chains or with other retailers who were enjoying concessions and selling at or below the former's cost (R. 817-8, 1006). The result was that retailers generally were losing interest in the sale of sugar and were so reluctant to sell sugar, either because they could not make a profit on it or because every bag sold represented an actual loss, that they actually discouraged sugar purchasing by customers (R. 597, 817-8). Wholesalers, who were the victims of the concessionary system, lamented the fact that they had to handle sugar, and sold as little as possible (R. 597, 1004, 1009). This situation manifestly contributed to the fact that in the year 1927 sugar consumption fell about 10% in the country (R. 592).

That the secret concession system would lead and was leading to a substantial lessening of competition tending

to monopoly among distributors is not a theory but a demonstrated fact. The distribution of sugar to the trade and among the public is dependent upon the operations of a multitude of wholesalers and retailers, who buy from the refiners for resale to retailers and the ultimate consumer, and it is inevitable that the channels of distribution will be stopped up and free competition impaired if one wholesaler or retailer can obtain his sugar at a substantial rebate while his competitor must pay the full price. The latter not only may be, or probably will be, but actually and necessarily *is,* placed at an arbitrary competitive disadvantage which not only reacts to his detriment but discourages him from pushing the sale of sugar, because he is not able to compete on equal terms, with the result that competition is bound to be lessened. Laboring under this unfair handicap, the wholesaler or retailer who is discriminated against will either become an unwilling seller of sugar, thus discouraging distribution, or will withdraw or be driven out of the sugar business altogether. This is the result which must inevitably ensue, and that it was the result which actually ensued from the discriminations prevalent in the sugar industry prior to the formation of the Institute is abundantly shown by the evidence.

The Finding of the Trial Court that "there is no substantial evidence that the pre-Institute secret concessions and fraudulent practices did or would lead to monopolies among the distribution agencies" is in complete conflict with the undisputed evidence, and is inconsistent with the statement in the Opinion pointed out above, where the Trial Court says that "It may well be that such discriminatory concessions tend to create territorial monopolies in sugar distribution" (R. 94).

Effects of Secret Concession System on Refiners.

The situation was equally disastrous to the refiners themselves, who were fighting a battle with concealed weapons in the dark. They did not know what competition they had to meet. The only guide they had was the representations of the customers as to what secret deals they were able to make with other refiners. The refiners then had the choice of meeting the supposed deals or losing the customers. They had no means of verifying the representations (R. 598, 883, 1060-61, 1064). Perhaps the competition was real; perhaps it was false. In either case, it had to be met or the customer making the demand for the concession was lost. If he did not get the concession after representing that it had been offered by another refiner, he had to save his face by changing his source of supply whether he actually had an offer of a concession from the other refiner or not (R. 598, 937).

The Trial Court found "There is no substantial evidence that the pre-Institute situation caused or would cause substantial injury to the 'ethical' refiners as a class" (Finding 27, R. 271). It is submitted that this Finding is in utter conflict with the evidence.

It is abundantly clear from the undisputed testimony that the entire industry was caught in the coil of a viciously descending spiral of dishonesty and disaster. Not only did all members of the industry suffer "substantial injury" from the cancerous growth of the secret concession system, but the "ethical refiners, as a class" were in a peculiarly perilous situation. The refiners who had succumbed to the secret concession practice could grant secret rebates and thus retain the business of customers who represented that

they could obtain similar concessions from other refiners. The losses involved in such forced concessions could be recouped from the larger body of customers who did not share in the secret bargains.

But the refiners who were still attempting to follow the open price policy could meet these special concessions and retain their customers only by announcing openly a reduction in their basis price available to all customers without discrimination. If the secret prices they were called upon to meet were too low to be offered to all their customers without disastrous losses, they were helpless to protect themselves, because, of course, they could not openly announce that they were discriminating between their customers by selling to some of them at lower prices than to others. They were thus impaled on the horns of a dilemma. They must either stand helplessly by and see their best customers taken away from them, or bring the whole body of their prices down to the disastrously low levels of the secret concessions of their competitors.

Their position was well put by Campiglia of C. & H., whose company was the largest and strongest of the ethical refiners and had suffered a loss of over two and one-half million dollars in 1927, the year before the Institute was formed (Ex. E-17):

> "In 1927, the secret allowances, concessions and rebates were becoming more extensive all the time. Eastern and Southern refiners were offering more extensively specials to certain customers and taking customers away from us in one locality after another. * * *
>
> "It was not always easy to find out how much of a concession a customer was receiving or what customers were receiving concessions. When we

> did have sufficient information we met them by making a reduction in our price list. That was a very expensive thing for us to do and imposed considerable penalty on us by giving the price openly to all our customers, whereas our competitors may have given it only to some of them. * * *. It reached a point where we were not sure whether or not our open price policy would be adequate to meet the special concession system of competitors. *We did not know whether we could do that and still stay in business or whether we would maintain our open price policy and lose all our trade*" (R. 716-7).

Sullivan, Vice-President of Western, the other Pacific Coast ethical refiner, referring to conditions prevailing in 1927, testified:

> "* * * We could not indefinitely accept conditions as they were. We were losing customers but never could find out exactly why we lost them. I believed that customers were receiving secret and attractive terms and rebates which we did not give them. * * * We did not know exactly what they were but we do know that we lost business. There was a fatal coincidence between these representations and demands for concessions and the loss of a customer" (R. 883).

Worcester, of Revere, one of the two Eastern refiners adhering to the open-price system, whose company suffered a net capital loss of 3.10% in 1927 (Ex. E-17), testified:

> "By the end of 1927 it had become very hard for a refiner who was isolated as we are to really keep tabs on everything competitors were doing. Conditions changed daily and it was expensive to keep cutting our price to meet them. In certain lo-

calities we stopped selling sugar because it was not worth while" (R. 688-9).

Goetzinger, of Arbuckle, the only other Eastern refiner holding out against the secret concession system, testified:

> "* * * During the latter part of 1927, competition had become so fierce and conditions so disturbing that no man knew where he was. * * * Arbuckle, C. & H., Revere and one or two other exceptions like them were not giving concessions, but everything was going on. * * * We could not, under our policy of open announcements of prices, possibly have followed their procedure. * * * We have been in the coffee business since 1859 and in the sugar business since 1898 and have always been an open one-price house to everybody, treating all our customers alike. We despised these concessions because we did not think they were fair" (R. 680). "* * * We hoped that the Institute would rectify some of the competitive practices which were going on. We called them competitive but they were practices which we could not ourselves adopt. We proposed to eliminate some of the irregularities, secret concessions and things we were ashamed to adopt as our own" (R. 681).

Henderson, the only ethical refiner located in the South and the smallest unit in the industry, suffered a net capital loss of 5.81% in 1927 (Ex. E-17). Many, Henderson's manager, testified:

> "* * * We saw our customers disappearing and had every reason to believe that they were doing it because of some unfair practice. We discussed it many times because we were using a lot of red ink and wanted to stop it if we could. * * * By the end

of 1927 we had taken a great deal of punishment. We had lost a great deal of money. The truth is we were really considering stopping the refinery" (R. 992). "* * * The competition of 1927, as is perfectly evident, would undoubtedly have eliminated Henderson and probably a number of other small refineries, leaving the powerfully capitalized ones to control the field" (R. 994).

The experience of the refiners was a practical demonstration of the principles of economic science. Edwin R. A. Seligman, Professor Emeritus of Political Economy of Columbia University and internationally recognized economist, testified:

> "Secret price cutting or cutthroat competition may bring about at any given moment a price which is somewhat lower to a larger number of buyers than the price which would exist in the absence of such price cutting. Cutthroat competition will result in lower prices than the ordinary economic competition. However, it will result in those lower prices only for the time being because, as soon as the unfortunate competitor is now excluded from the market because of these cutthroat prices, it will be seen that this was simply a point in the process of attaining a monopoly. The cutthroat competitor who is now left, being in control of the market, his competitor being excluded, will at once proceed to raise the prices and enjoy all the fruits of monopoly.
>
> "We have an excellent illustration of that fact in the history of railway transportation, in the building up of the meat packers, in the great quasi-monopolies in Chicago and, above all, in the recognition of this situation by the Interstate Commerce Law which absolutely forbids all such secret rates, cutthroat rates and so forth" (R. 1133).

The late Thomas S. Adams, Professor of Political Economy at Yale University, former President of the American Economic Association and the National Bureau of Economic Research and former Economic Advisor to the United States Treasury Department, testified:

> "As an economist I emphatically condemn the practice of secret allowance and price discrimination and rebates * * *. I condemn it in the first place because I think it interferes with the normal operations of supply and demand in the sense that the economist believes that supply and demand thus operating fix prices. I condemn it because I think in the long run it necessarily increases the cost of industry. If a dealer or a producer makes an open price reduction and everybody knows about it, almost inevitably in a short time all buyers get the benefit of it, so that the reduction spreads throughout the mass of buyers generally. If he makes it secretly, only to a few, then only a class of favored buyers get it. I object to it particularly, that is, to secret price discrimination, because I had considerable experience as a young man in a business in which secret price quoting and discrimination were rife. I quit that business with a very deep conviction that you cannot stay in a trade and keep honest if you are giving secret price discriminations. As far as my experience goes and my subsequent observation, it necessarily involves lying and deceit. I think that has been a really material element in the formation of economists' opinions on this subject" (R. 1162).

The sugar trade situation in 1927 was a sorry one indeed. Fair, open and honest dealing between customer and refiner was the exception and was rapidly becoming impossible. The open price refiners faced the constant loss of

customers. Misrepresentation and chicanery were the order of the day. The honest or less favored merchant, like the open price refiner, could only stand by and watch his business disappear. The refiner who could juggle the most deals without letting either hand know what the other was doing was the most successful. Competition, if it may be termed such, was that of the jungle with no weapons barred. The sale of sugar was being discouraged and suppressed by the main body of wholesalers and retailers who could not compete on equal terms with the concessionaires. The tendency was toward monopoly, "against the best interest of the refiner, the wholesaler, the retailer and the consuming public". The entire industry was demoralized.

We take the position that the surreptitious competition of the years immediately preceding the Institute, of which the secret concession was the principal feature, and which was well on its way toward complete elimination of honest and open dealing between refiner and customer, is not the type of competition which is protected by the Sherman Act. We assert, on the other hand, that it is unethical and demoralizing, that it is uneconomic and stifles true competition, and that it is illegal under the Clayton Act.

C. Defendants' Purposes in the Formation of the Institute.

The primary and dominant purpose of the refiners in the formation of the Institute was the elimination of a type of competition which involved fighting in the dark and made it necessary in self defense to resort to practices which they themselves disapproved and of which they were ashamed. A business man with honest instincts does not like double dealing with his customers nor the conscious-

ness that he is providing one customer with a club with which to ruin another's business. The refiners were perfectly willing to submit to the hard knocks of open competition and take their chances in the struggle. What they wished to get rid of was the type of secret attack which they could not guard against by open and honest effort and which they could only hope to forestall by giving blows in the dark themselves, to the resulting disadvantage of the trade as a whole, their own customers and their own business.

The economic consequences of the secret concession system to the industry as a whole and to the refiners adhering to the open-price policy in particular have already been touched upon. The refiners who were resorting to the policy of secret rebates were not only ashamed of what they were doing but were concerned about their liability under the Clayton Act for illegal discrimination (R. 605-6; 1034). The finding of the Trial Court that the refiners were disturbed not only economically and legally but morally over prevailing conditions (Finding 29, R. 271-2) is well substantiated by the testimony.

As stated by Post, of National:

> "Our company and the others, I think, *were very much ashamed of the kind of business we had to do.* It was very humiliating to have to be unethical in our transactions and we all welcomed the opportunity to try to work out some legal method of conducting business without unethical conditions" (R. 1060). "* * * We were all very unhappy about the practice of giving secret concessions to special customers and very much ashamed that it was necessary for us to do so. It was very unfair and very

unethical to continue business in that way, but we had drifted into that manner of doing it. We would have welcomed an opportunity to try to correct it. It would not have been possible to do so without the cooperation of practically all the refiners" (R. 1062).

Goetzinger, of Arbuckle, testified:

"* * * At the time the Institute was formed I attended the meetings as an observer in order to post my chief, Jamison, when he returned from Europe. I became very much impressed by the earnestness of the 18 or 20 men who devoted every hour of every day in the week to a discussion of the means to better conditions in the sugar industry and by what Cummings told us of his reception in Washington" (R. 679). "* * * We hoped that the Institute would rectify some of the competitive practices which were going on. We called them competitive but they were practices which we could not ourselves adopt. *We proposed to eliminate some of the irregularities, secret concessions and things we were ashamed to adopt as our own*" (R. 681).

Foster, of American, testified:

"We joined the Institute because we felt the platform of openly announced prices and the same treatment to all was the only solution of the evils in the industry. We believed in that policy. We believed that it would instill more confidence in the trade between the refiners, would tend to stabilize the industry and, I am frank to say, we expected to make more money" (R. 1037).

Pennsylvania's reason for joining the Institute presents the open-price system versus the secret concession

system from the standpoint of a newcomer in the industry. It reveals that the former encourages and facilitates the entry of a new competitor into the field, while the latter discourages and impedes his entry. Pennsylvania, in 1928, started on a new course. It had been out of the selling end of the business for seven years and had lost contact with the trade, so that it was under the necessity of forming a new sales organization and had to determine the policy it was to pursue—the open-price policy or the policy of giving concessions.

As expressed by Hoodless:

> "* * * *We thought the principles embodied in the proposed Code of Ethics represented decent business principles.* * * * We had to decide whether to sell on open prices publicly announced or have a price list from which there would be a deviation as circumstances warranted and by which we could make trades with people. The policy embodied in the Code of Ethics made it a much simpler matter for us to start with open and publicly announced prices. * * * It would have been more difficult for us to do business on the other policy, of ferreting out secret concessions. *We believe the open-price system was the proper one for doing business because we believed we ought to do business on a fair basis with everybody. By the other method we would have had to rob Peter to pay Paul"* (R. 699-700).

The refiners had seen the full fruits of the secret concession system. Wholesalers and retailers had become increasingly reluctant to sell sugar because of inequality of competitive conditions, refiners' customers were complaining that the system was wrecking their business (R. 597, 688-9, 817-8, 1003-4, 1006, 1009), and consumption had

dropped 10% in 1927 (R. 592). There was a growing tendency toward monopolistic control on the part of various distributors (pp. 18-23, *supra*), and the financial results to various of the refiners were increasingly alarming, the industry as a whole having suffered a net loss in the year 1927 (Ex. E-17).

It is not claimed that the net loss which the industry as a whole suffered in 1927 was *entirely* due to the secret concession system, or that the refiners *believed* that it was entirely due to that system. It was in fact, as will be developed later (pp. 90-97; 37 below), due largely to the high average price which refiners had to pay for raw sugar in 1927, as compared with 1926 and 1925 (See Ex. S-17, p. 1 of Appendix), and to their lack of adequate trade statistics, which led to the accumulation of excessive stocks and the consequent dumping of those stocks in the fall of 1927. But the effects of that underlying cause were undoubtedly accentuated by the secret concession system and by the lack of any statistical information which would have enabled the refiners to avoid the great accumulation of excess stocks which led to the dumping of such stocks at disastrous prices in the fall of 1927.

There can be no doubt that a regime of fair, open, orderly competition which enables the refiners to plan their policies intelligently, with full knowledge of accumulated stocks and other trade conditions, and which makes success depend upon honest sales effort rather than upon sharp practice, results on the whole in greater financial advantage to the trade, the public and the competitors themselves. It is an old adage that honesty is the best policy and the teaching of economic science is in accord. Professor Adams testified:

> "* * * The existence of economic competition with a suppression of undesirable forms of competition might easily have the effect of stabilizing profits or increasing profits under certain circumstances. I would expect sound economic competition to do that, to eliminate undesirable forms of competition" (R. 1166).

This result is so well realized that there is small wonder if it was in the minds of some of the refiners when they were considering the elimination of the discriminatory and uneconomic type of competition which prevailed in the sugar refining industry in 1927. As stated by Foster, his company expected to make more money as a result of the elimination of the abuses which existed in the industry (R. 1037). Goetzinger testified to the same effect, saying it was his expectation that the Institute would eliminate "the irregularities, secret concessions and things we were ashamed to adopt as our own. We thought the whole atmosphere would be cleared and that we would profit thereby. That is all we are in business for" (R. 681).

Such frank statements by two or three of the refiners that, among other results, they hoped they would profit by the abolition of the shameful secret concession system, appear to be the only direct basis in the Record for the Court's finding that their dominant motive in the organization of the Institute was to eliminate price competition and maintain relatively high prices for refined sugar. We submit that it is an utterly inadequate basis for such a finding. It was natural for the ethical refiners to hope that they would benefit by the abolition of the secret and discriminatory concessions which they were helpless to meet under their open-price policy and which were resulting in their losing many of their customers. And it was natural for

the unethical refiners to hope that the abolition of these methods of which they were ashamed, but which they felt obliged to use in self defense, would result in their saving the money which they were handing out to "chisellers", who got their discriminatory concessions by false representations as to secret offers from other refiners. Those were legitimate and reasonable hopes, and they implied no suppression of fair competition and no detriment to sugar purchasers generally. On the contrary refiners contemplated a type of competition which should be open and honest and fair to refiners and distributors and the public, and they believed the abolition of secret concessions would result in no detriment to anyone except the concessionaires, who would thereby lose the discriminatory and unfair advantages they had previously enjoyed over their competitors.

In fact, as we shall show (pp. 89-103), under the open competition of the Institute regime the refiners' selling price consistently followed the price of raw sugar downward and held the refiners' margins and earnings to substantially the same as before the Institute. What these facts inevitably reflect and what the evidence later discussed will show, is a competition among the defendants as intense after the Institute was organized as before, but with its effects and benefits uniformly extended to all purchasers of sugar, instead of being deflected into the pockets of a comparatively few concessionaires.

The major benefit hoped for and realized from the Institute's operations was the cleaning up of the old system of competition in chicanery and deceit and the abolition of the secret and unfair discriminations which made the refiners ashamed of the business they were engaged in.

Other Purposes in Forming the Institute.

Although the abolition of the vicious and discriminatory system of secret concessions through the adoption of the principle of open prices publicly announced, without discrimination among customers, was their dominant purpose, the refiners had other reasons for forming the Institute.

Statistics. Previously, there was no available source of statistics as to refined stocks, no accurate information available as to consumption, no information available as to the location of stocks about the country or with the trade, and no accurate statistics as to production. There were no statistics as to melt or as to stocks that were being piled up at refining centers or in different parts of the country, and no information as to current deliveries (R. 592, 607, 710, 994, 1035, 1060). One result of this lack of information was that the refiners built up in the middle of 1927 excessive stocks of refined sugar and dumped it at the end of the year at ruinous prices, when they found it could not be moved (R. 592).

Campiglia, of C. & H., emphasized the value of the statistical service of the Institute, in giving C. & H.'s reasons for joining:

> "Statistics that the Institute compiled gave us the distribution by states which we had never been able to secure before. It gave us a comparison with distribution of former years, by states and it gave us the quantities of stocks of raw and refined sugars on hand. It permitted us to determine whether stocks were piling up and accumulating or moving out freely to the trade and many things which we considered valuable" (R. 710).

Sullivan, of Western, testified that his company had long felt the need for some manner of exchange of statistical information such as that provided by the Institute (R. 883). Many, of Henderson, testified that the Institute's statistical service was of considerable value to Henderson (R. 994). So did Hoodless, of Pennsylvania (R. 699). Foster, of American, testified:

> "* * * We also, as I have announced before, were cranks on this question of statistics. I could not see how any industry could operate successfully without knowing what was going on. We were always moving around in the dark and we thoroughly believed, if the industry itself knew what was going on in the way of meltings and deliveries and had some knowledge of stocks, that we should have guide posts to enable us to carry on our business better" (R. 1037).

Post, of National, testified:

> "We had no definite information as to melts, stocks and deliveries, to enable us to carry on our business intelligently. We had to guess at the stocks of sugar throughout the country. * * * The desirability of statistical information was discussed. We all realized that the real situation was a matter of guesswork and welcomed an opportunity to have statistics given to us in a reliable way through some organization" (R. 1060).

Wasteful Practices. Another important purpose of the refiners in the formation of the Institute was the elimination of certain wasteful practices such as the unnecessary multiplication of consignment points. As explained by Cummings:

> "One of the most wasteful practices in the industry in the years 1925 to 1927 was the building up of these large stocks at consignment points. There were literally hundreds of them over the country where several refiners would have warehouse stocks which could be withdrawn on order of the local broker. By reason of the duplication by the refiners these stocks in different communities were sometimes five and ten times more than was needed for ordinary 30 to 60-day deliveries. They deteriorated, resulting in a great loss to the refiners in capital investment and inventories which they could not hope to move" (R. 593).

(See also Castle, R. 927-8.)

Goetzinger, of Arbuckle, testified:

> "One of the purposes for which the Institute was organized was to limit the number of consignment points. In 1927 the existence of consignment points in almost every market where sugar was being sold caused an enormous waste of money" (R. 682).

The paramount importance of the efforts to eliminate economic waste of this type is particularly clear in the case of the small refiner. As testified by Many, of Henderson:

> "* * * It is obvious that a small refinery like ours could not offset consignments in such a large number of points, the actual consignments of sugar requiring the laying out of a greater amount of money than we could possibly stagger under. If you multiply an additional car of sugar by the number of consignment points * * * you will find that the total amount of money involved comes to a big sum which was more than we could handle, so we just had to move out of those states because if there is

> a consignment point in a town and you do not put in an offsetting consignment, it greatly reduces your chance of selling sugar in that market" (R. 996).

Credit Bureau and Advertising. Still other purposes of the refiners in the formation of the Institute were the creation of a credit bureau and the institution of an advertising campaign, calculated to increase the consumption of sugar and thus increase the volume for all sellers (R. 607, 710). By far the largest expense of the Institute has been its advertising activities, combatting the "slimness" fad, and urging the value and desirability of sugar as a food. It has spent about $450,000 a year in pushing the sale of sugar (R. 632).

In connection with this effort to promote the sale of sugar, the refiners were once again confronted with the existing system of rebates and concessions. It has already been pointed out that the effect of that system was to play havoc with the refiners' trade through discouraging the sale of sugar by those dealers who did not receive rebates. Obviously with the great body of their customers in this frame of mind it was impossible to interest the trade in actively promoting the sale of sugar until the source of the dissatisfaction was removed.

It was clear that the only way in which the concession system could be abolished was for all the refiners who were practicing it to abandon it at once. So long as any refiner continued to give concessions, the fact was bound to be known in the trade and others would inevitably feel that they themselves must necessarily meet these concessions with concessions of their own as a weapon of self defense. Concert of action was thus essential if any progress was to be made, but for a time the relations of the refiners to-

ward one another were marked with such bitterness and suspicion that it seemed unlikely that any step could be taken (Opinion, R. 225). As it happened, it was essential for the initial action in bringing the refiners together to be taken by an outsider, Cummings, who sent out the letter of invitation for the first general conference of the refiners looking toward the formation of the Institute (R. 606). His former company, Warner, was then no longer in the business.

D. The Formation of the Institute and Relations With the Department of Justice.

A brief review of the precise manner in which the Institute came into existence is sufficient to show that the Trial Court's finding of improper motives and bad faith in the very inception of the Institute (Finding 36, R. 273) is wholly without foundation.

The movement sprang from preliminary conferences held in New York in June, 1927, between five New York and Philadelphia refiners—American, National, Spreckels, McCahan and Lowry, who was at that time operating the Pennsylvania refinery. Cummings attended the meetings as counsel for the purpose of advising them as to the possibility of legally correcting the conditions which had developed in the industry (R. 604). The discriminatory and unethical practices prevailing in the trade and possible liability therefor under the Clayton Act were reviewed at length (R. 604-6). The refiners were ashamed of the secret concession system and alarmed at its effects, and expressed their desire to form a trade association with a Code of Ethics which would declare for the sale of their product

without discrimination among customers, on openly announced prices and terms, and which would enable them to cooperate in the gathering of needed statistics, in credit matters, and in advertising and promoting the sale of sugar.

Cummings stated that the matter should be submitted to the Attorney General before the association was formed (R. 606). The meetings were continued at a later date when each of the refiners came with a list of the different forms of secret concessions which were being given. These were reduced to a dozen or more statements of practices in the industry which it was considered should be abolished. It was proposed to submit this list of unethical practices to the Attorney General in order to secure his judgment as to whether they might or might not be lawfully abolished by a trade association (R. 606).

In July, 1927, Cummings went to Washington and talked first with the Department of Commerce, which lent encouragement to the formation of the association and referred him to the Department of Justice. There he conferred with Colonel Donovan, the Assistant to the Attorney General in charge of Anti-Trust matters, to whom he submitted a draft, in typewritten form, of a proposed charter and certificate of incorporation for the association, a proposed set of by-laws, and the list of trade practices which it was proposed to abolish (R. 607).

The Department of Justice assured Cummings of its full cooperation and in a lengthy conference the proposals were discussed in detail and it was agreed that when the program was placed in final form it should be submitted to the Attorney General's office. Cummings reported these facts to the refiners who had consulted him and it was then agreed to invite the other companies to a general refiners' meeting (R. 607-8).

At meetings of all the refiners held in New York in December, 1927, the conditions in the industry and the possible liabilities under the Clayton Act were again reviewed (R. 608-10). In a series of conferences lasting an entire week, they reduced to definite terms the items which had been discussed with the Attorney General, in the form of a proposed Code of Ethics. Full minutes of these meetings were kept and a copy forwarded to the Department of Justice together with the certificate of incorporation and by-laws (R. 609, Ex. V-2, W-2).

During the early days of January, 1928, Cummings with Babst and Post held conferences with Colonel Donovan and several assistants to the Attorney General, at which the various provisions of the proposed Code of Ethics were discussed in detail. As a result of the first conference, Cummings and the refiners' representatives made revisions in the Code. At a final conference at the Attorney General's office the Code of Ethics was drafted in final form (R. 610-11, 614-8).

A meeting of the refiners was then held on January 7, 1928, and the Code was adopted, and, as stated in defendants' answer (R. 61), except for two minor changes, "the Code of Ethics of the Institute has remained and now is identically as it was approved by the Attorney General of the United States on the 28th day of January, 1928" (Finding 32, R. 272).

Not only did the formation of the Institute come under the supervision of the Department of Justice, but it was the desire of the Institute and of its members to cooperate with the Attorney General's office in all the subsequent activities of the Institute. It was their hope and expectation that representatives of the Attorney General's office

would frequently visit the Institute and follow in a constructive way its development. Cummings testified:

> "I told the Attorney General it was our desire to cooperate with him in the conduct of the Institute, particularly as it had been organized in the way it had with his cooperation. I asked him to send a representative of his office as frequently as he desired to get any information he wanted regarding the conduct of the Institute or the business of the members. I asked him if he would send a representative to the first few meetings until it got under way. He declined to do that, saying they would avail themselves of the suggestion to make frequent visits to the Institute. I told him anything that the Institute had at any time in the way of correspondence, documents, files or anything was open to any representative of his office at any time" (R. 611-2).

When the Code Interpretations (the specific regulations applying the general Code principles) were first printed in November, 1928, a set was forwarded to the Attorney General and supplements were furnished him as they were issued from time to time (Finding 33, R. 272).

The first visit which the Department paid to the Institute was in May, 1928, when Lamb and Whitney of the Attorney General's office applied for and were given full access to the entire files of the Institute. Whitney, who actually conducted the examination, was given a key to the Institute offices and was given access to all the files, records and correspondence and worked there at his pleasure, including Saturdays and Sundays, when no members of the Institute staff were in attendance. His examination was not completed until December and his two comprehensive memoranda reviewing each section of the Code of Ethics

and discussing in detail such questions as price, refiners' prices, margins and profits, the open price reporting system, price guaranties, abolition of secret rebates, concessions and quantity discounts, elimination of unnecessary consignment points and the like (R. 612-3, Ex. C-3) show the complete lack of foundation for the Finding of the Trial Court that

> "* * * The Department did not conduct a comprehensive investigation of the restraints involved in this case until the end of 1930, when an agent of the Department inspected the Institute files for a period of approximately one month" (Finding 33, R. 272).

This Finding is correct only in the sense that the representatives of the Attorney General who made the earlier examination of the Institute's activities did not have the same view of what constituted restraints as those who came in later and finally started this suit.

Further examinations of the Institute files and operations were made by other representatives of the Attorney General's office. Mr. Fly, who participated in the trial of the case, made an examination in December, 1929, and Gorsuch in December, 1930. Both were given full and complete access to the Institute offices and their contents (R. 613, 1150-51).

We do not question the right of the Attorney General's office to change its mind concerning the Code of Ethics and the Institute's operations. On the point, however, of whether the refiners, with the advice and assistance of Cummings, formed the Institute in good faith, in an honest effort to restore fair competitive conditions and to abolish unfair discriminations among customers, or, as the Trial

Court has found, as part of a scheme to fix prices and restrain trade, the attitude and actions of the refiners and their counsel in their relations with the Department of Justice are of the utmost importance.

No important change was ever made in the Code of Ethics, from the day it was put in final form in the Attorney General's office. No Code Interpretation made by the Institute, no letter it ever wrote, no document in its files, or, for that matter, in the files of any of the fifteen refiners, was ever withheld from the agents of the Department of Justice. The functionings of the Institute were always under the eye of the Department. Its offices were always open to the representatives of the Department and, although the defendants were unaware of the impending action, the Government's case was built within the Institute's doors, with documents which the Institute invited the Department's agents to examine. Literally hundreds of documents which have been introduced in evidence in this case by the Government, as proof of a most reprehensible conspiracy in restraint of trade, were made available to and actually examined by the Department years before the suit was brought.

We submit that the open manner in which the Institute was formed and conducted, as evidenced by the history of its relations with the Department of Justice, completely refutes the finding of the Trial Court that the dominant purposes of the refiners in its formation were improper and illegal. That finding was built upon the Court's inherent suspicion of business men and not upon the evidence. Men who are engaged in such a conspiracy do not conduct themselves as these defendants did.

II.

THE OPERATION AND EFFECT OF THE BASIC AGREEMENT THAT SUGAR SHOULD BE SOLD ONLY UPON OPEN PRICES AND TERMS, WITHOUT DISCRIMINATION AMONG CUSTOMERS.

A. The Basic Agreement.

The fundamental question to be determined by this Court, is whether the Anti-Trust Laws render illegal the concerted adoption by the defendants of the single basic principle upon which the Institute was founded, namely, that *"All discriminations between customers should be abolished. To that end sugar should be sold only upon open prices and terms, publicly announced"* (Code of Ethics, R. 260-3).

The urgency of the situation which led to the adoption of this principle is expressly recognized by the Trial Court:

> "The Industry was characterized by highly unfair and otherwise uneconomic competitive conditions. Arbitrary, secret rebates and concessions were extensively granted by the majority of the companies in most of the important market areas and the widespread knowledge of market conditions necessary for intelligent, fair competition were lacking" (Finding 29, R. 271).

Having adopted the principle of open prices and terms, without discrimination among customers, as the means of remedying the evils of the secret concession system, the defendants lived up to the principle. The Court found that

> "Under the Institute, defendants agreed to sell, and in general did sell sugar only upon open prices, terms and conditions publicly announced in advance of sales, and they agreed to adhere and in general did adhere without deviation, to such prices, terms, and conditions until they publicly announced changes" (Finding 40, R. 274).

The legality of this principle is condemned in a Finding clearly reflecting what we believe to be the fundamental error of the Trial Court and representing the crux of the entire case:

> "The agreement to sell only on prices, terms, and conditions announced in advance of sales, the actions pursuant thereto, and the reporting system in aid thereof, constitute undue and unreasonable restraint of trade" (Finding 56, R. 279).

Before the real nature of this Finding can be understood and its error appreciated, we must understand the immemorial and unique practice in this industry of selling on "moves", we must know just what the price announcement and marketing system of the sugar industry was before the Institute was organized, and we must know that the Institute made no change in that system except the elimination of secret concessions.

B. Marketing System and Price Announcements before the Institute.

Sugar "Moves". Sugar has always been sold on so-called "moves", both before and since the organization of the Institute (Finding 45, R. 276). A "move" takes place when the refiners make public announcements that, at a

fixed time within a day or two, they will *advance* their selling price to a named figure, either higher than the presently current selling price, or higher than a reduced price which the announcements offer before the advance. Buyers then hurry to place their orders, usually for a month's supply or more, at the lower price available before the hour fixed for the advance (R. 663-4).

These moves have always been initiated by the public announcement of some one refiner who believes that trade conditions—particularly the price of raw, the diminished stocks of refined in the hands of the trade, and accumulated stocks of refined in the hands of refiners—call for a move (R. 670-8, 685-7, 705-9). In actual practice this initial announcement may be made by any one of the refiners, large or small. The move actually takes place, however, only if *all* refiners follow the initial announcement with like announcements of their own. If *any one* of them fails to follow—for example, by making no announcement at all—the others must perforce announce a withdrawal of the advance (R. 635-6), because, as stated by the Trial Court, sugar is a completely standardized commodity, and no refiner can sell his sugar at a given price when any other refiner is known to be selling at a lower price (Opinion, R. 221; Finding 17, R. 269).

The attempt of a refiner to bring about a move at a given price or time may thus be defeated either by one or more refiners failing to make any announcement at all, or by one or more announcing an advance to be effective at a *later date,* or by one or more announcing a *decline,* effective immediately, to be followed by an advance a day or two later, or by one or more announcing a decline without announcing a later advance.

These announcements are all made telegraphically, within the space of a few hours, and they usually present a welter of conflicting announcements by different refiners, until finally they all have followed some one of the announcements and the move takes place, or one or more refiners have failed to follow any announcement, or have announced a *decline* not followed by any advance, and the attempt to precipitate a move has thus been frustrated (Ex. O-3).

As the Trial Court found, there was no consultation, collusion or agreement among the refiners in these price and terms announcements (Finding 48, R. 277; Finding 201, R. 310). These maneuvers, both before and after the organization of the Institute, constituted the very essence of competition, functioning publicly and fiercely, with each refiner reflecting, in the price and terms he offered, his own views of what the market required.

"Jockeying" of this sort has always prevailed, both before and after the organization of the Institute, and completed moves take place only about eight or ten times a year, depending mainly on the course of the raw sugar market. In a declining raw sugar market, the usual practice in bringing about moves is to announce a decline, effective immediately, to be followed by an advance, effective a day or two later, to some price usually no higher than the price prevailing at the time of the announcement, or perhaps lower than the prevailing price but higher than the move price (R. 641, 670, 673, 706).

A Completed "Move". We print in the Appendix a graph from Exhibit O-3 illustrating these moves in the year 1930. As to the way moves take place, it is substantially typical of all years, both before and after the organization of the Institute. Referring to that graph, the events of

March 6th to 8th furnish an illustrative example of a simple *completed* move. As the graph shows, raw sugar advanced sharply from $3.49 to $3.67, the advance commencing March 5th and ending March 8th. On March 7th, when the current price of refined was $4.85 per hundred pounds, the California & Hawaiian Company announced a reduction of 15 cents per hundred pounds (in the form of a freight allowance of 15 cents) retroactive to March 5th, to be followed by an *advance* to $5.00, effective at the opening of business March 8th. All refiners followed this announcement in effect, some by giving the freight allowance and others by reducing their price to $4.70, and all announcing the advance to $5.00 to be effective on March 8th. These announcements by the various refiners all took place telegraphically, in the space of a few hours on March 7th, and before the opening of business on March 8th the sugar trade had placed its orders for more than 15 million bags of sugar (shown by solid columns at foot of graph), at the move price of $4.70. The columns of apparent sales on Saturday, March 8th, and Monday and Tuesday, March 10th and 11th, represent orders actually placed with outlying brokers and agents of the refiners before the opening of business on March 8th, but not all entered on the refiners' books until the three succeeding days.

A "Spiked Move". A typical example of a frustrated or spiked move is shown by the graph in the period June 4th to 10th. On June 4th to 6th raw sugar advanced 13 cents per hundred pounds. On June 6th, Revere announced an advance in refined from $4.50 to $4.60 to be effective June 9th. Revere was followed by Spreckels and Savannah, but Spreckels later withdrew the announcement of the advance. American announced the advance to $4.60

but made it effective June 10th. American was followed by Pennsylvania, National, Arbuckle, Spreckels, McCahan, Savannah (changing previous announcement), Imperial, Western, Henderson and Godchaux. Colonial (one of the smallest refiners) announced the advance to be effective June 9th, instead of June 10th, and then *withdrew* the announcement of the advance. Imperial then withdrew the announcement and was followed by all the other refiners who had announced the advance. C. & H. and Texas had not announced any advance, and Colonial's action in withdrawing its announcement and precipitating the retreat of the others was probably due to the failure of these two refiners to follow the advance. Conditions for the move were favorable because of the rise in the raw price, and especially because of the long time that had elapsed since the preceding move on April 4th. After such an unusual interval between moves the whole trade knows that buyers are short of sugar, and this was further shown by the unusually heavy purchases of sugar indicated by the graph on June 3rd to 6th, coincident with the decline in price and with no announcement of a subsequent advance.

Little Sugar Purchased between "Moves". As the graphs in Exhibit O-3 show, (see Appendix) the trade ordinarily purchases very little sugar between moves, substantially *none* unless the time between moves is unusually long and the trade is therefore getting short of sugar.

Contrary to the situation in other businesses, even the announcement of a *decline* does not result in any considerable sales by refiners, unless accompanied by an announcement of a later advance, because the trade knows that when one refiner announces a decline, all refiners will be obliged to follow (they always do—they cannot sell even the drib-

lets of day to day sugar if they don't), and that there may be another decline before there is a move, and that moves never take place without sufficient advance announcement so that all buyers can take advantage of the low price before the advance. If a month or more has elapsed since the last move, and some of the distributors are therefore short of sugar, they will begin to buy from hand-to-mouth on the announcement of a decline, but, for the reasons just stated, they will wait until a move before stocking up with a month's supply.

There is no substantial dispute about the foregoing practices in the selling of sugar, both before and after the organization of the Institute. They were fully established by the evidence and found by the Court (Opinion, R. 102; Finding 45, R. 276-7; Finding 50, R. 278; 386, 660-64, 671-7, 685-7, 704-9).

This system is the nearest approach to the ideal free market of a public stock or commodity exchange that is possible in an industry where the buyers cannot be gathered in a room with the sellers, and where the buyers, scattered all over the country, are buying for prompt resale, subject to a distributor's usual wholesale or retail margin.

This system is peculiar to the sugar industry in the United States. It developed naturally, through a long period of years (R. 664), to meet the special problems of the sugar trade, and it is directly responsible for the fact that sugar is sold on a smaller margin of handling cost and net profit by processors and distributors than any other product. Under this system of moves competition has driven these costs and profits down to the minimum, and if that system is destroyed, as the Trial Court's decision requires, the distributors' costs and margins must inevitably increase to

meet a new and artificial and less economic system of handling and marketing sugar.

The fundamental trade conditions out of which the move system developed, and the reasons why the Trial Court's decision would destroy that system and increase distributors' margins, will be discussed later. For the present our purpose is merely to inform the Court about the special characteristics of this unique marketing system so that the Court can understand just what steps the Sugar Institute took to adapt its principles of fair competition to that system, and why those steps were necessary if fair competition was to be brought about.

We next refer briefly to the relationship between the secret concession system and the practice of selling on moves.

"Moves" and Secret Concessions. Even the concessionaires bought the great bulk of their sugar on these moves. But to them the refiners' public announcement of the presently available lower price and the future advanced price meant something different from what it meant to the great majority of purchasers, and to each concessionaire it meant something different from what it meant to other concessionaires. Depending on their secret standing arrangements with their different refiners, it meant that they could buy at 5 or 10, or perhaps 20 or 25 cents per bag less than their competitors, or could get an equivalent concession in "storage" or "brokerage" or "advertising" or "freight allowance", or perhaps a combination of two or more of these types of concession. And some of the most favored among the concessionaires could even defeat the effects of the moves upon themselves through direct secret agreements or indirect storage and brokerage arrangements with the re-

finers which enabled the concessionaires to date their sugar purchases *back* when the refiners' price rose and *forward* when the refiners' price fell.

But generally the *principle* of the move remained the same to all buyers. They bought the great bulk of their sugar on a presently available lower price because all refiners had announced an immediately impending advance to a higher price.

C. The Price Reporting System of the Institute.

The Institute did not seek to change, nor has it changed, this system of moves, or the methods historically employed by the refiners in announcing their price changes (Finding 49, R. 277).

The entire program and activities of the Institute with relation to price changes are encompassed within the following four Code "Interpretations" (Ex. 20):

> "2. *Posting.* Refiners' basis price of sugar should be kept posted, *in accordance with the long-established custom of the trade;* upon their bulletin boards available to access by the trade. *In addition, they should notify the trade of price changes in the manner customary previous to the Institute.*
>
> "3. *Notification to the Institute.* (a) Price Changes. The Institute requests members *before notifying the Institute* of price changes to post or otherwise announce them in their customary manner and *then* to notify the Institute *of action which has been taken.*"
>
> "4. *Notification by Institute.* Upon receipt of a price change notification the executive secretary will give the same to the news agencies in New York

which operate commercial tickers. He will also advise by telegram members of the Institute, the Domestic Sugar Bureau and other distributors of refined sugar.

"5. *Three O'Clock Notice.* Except to meet a competitive price already announced, the Institute recommends to its members that they announce changes in price not later than three o'clock. Such timely announcement will enable a price change to receive wide publicity through the evening and morning papers. It will, furthermore, help to establish uniformity of practices which will be appreciated by the trade."

In brief, these Code Interpretations provide merely that the refiners' basis price should be kept posted *"in accordance with the long-established custom of the trade"*, and that the refiners should notify the trade of their price changes *"in the manner customary previous to the formation of the Institute"*. These provisions are merely an adoption of what all the refiners had found good through their years of operation and which had been accepted by the trade and become a uniform trade practice. And in substance, this is what the Trial Court found (Findings 49 and 50, R. 277-8).

The Only Innovation. The only innovation in respect to the announcement of price changes was the provision (Interpretation "3", p. 55, *supra*), that the members should, in addition to publicly posting their price changes and notifying the trade thereof in accordance with the established custom of the trade, notify the Institute of their price changes—but only *after* the members had publicly announced the price changes in the manner they had always employed; then they should notify the Institute of

action which *has been taken* (R. 661, 672, 686, Findings 49-50, R. 277).

The purpose of the provision for notifying the Institute of changes in prices and terms was to insure the most widespread publicity possible for the announcements *and to insure the accuracy of that publicity* (R. 637, 668). Accordingly, it was provided that the Institute, upon receipt of notification of changes in prices and terms should give the same to the news agencies in New York and advise by telegram other refiners and distributors of refined sugar (Interpretation "4", pp. 55-6, *supra*).

Pursuant to this provision it has been the practice of the Institute to circulate among all of its members the exact wording of price change announcements of each refiner and, furthermore, to give such announcements to the commercial tickers and news agencies, to the Domestic Sugar Bureau and to the various sugar brokers who have always been accustomed to notifying the trade of price changes (R. 633).

Accuracy was highly important. These announcements were not simple statements of a change in price, but were often very complicated, especially in the matter of changes in terms and specification of the territories where such terms were applicable. And during the time when such a change in price or terms or both was under way, the wires were kept hot with scores of conflicting announcements, until finally a move had been effected at some price and upon some terms to which all refiners had settled down; or the move had been "spiked" and the attempted advance of one or more of the refiners had perhaps resulted in a decline; or, if no move had been attempted, a simple decline or change in terms had been effected.

Typical illustrations of both the simple and the more complicated announcements of changes in price are contained in the abstract of certain price-change movements set out in Exhibit N-3 in the Appendix to this brief.

The refiners testified that the information as to price changes of competitors always reaches them through the ordinary trade channels *before* they receive the Institute relay (R. 662, 672, 686). This fact is graphically demonstrated by Exhibit H-4, being a file of price-change announcements received by the Western Sugar Refinery on typical "moves" before and since the Institute, which shows that Western not only received detailed reports as to the price changes of its competitors from various sources before the Institute was organized, but that it still receives the information from the same sources *before* it is received from the Institute.

No Price Comments or Propaganda by the Institute. The Institute receives and circulates the exact terms of the announcements (Ex. K-3, L-3). It does not add any suggestions or notations of its own nor does it do anything else in relation to price changes outside of relaying these price announcements (R. 633). As found by the Trial Court,

> "Data respecting price changes have been circulated by the Institute without comment" (Finding 55, R. 279).

There were no price discussions at Institute meetings (R. 219-20), and no price propaganda by Institute officers or literature, such as led this Court to its decision in the *Hardwood* case (257 U. S. 377).

The Three O'Clock Rule. The recommendation that members announce their price changes not later than three

o'clock is in the interest of widespread publicity, as the ticker services close at three o'clock and announcements made before three o'clock will appear in both evening and morning papers, whereas announcements made after three o'clock are too late for the evening papers (R. 634). The Court analyzes the history and effects of this "Interpretation" in Findings 45 and 46 (R. 276-7) and concludes, in Finding 47 (R. 277):

> "The effect of the Three O'Clock Rule in and of itself, seems to have been advantageous to the trade in case of a price advance in that the uncertain period of grace has been replaced by a definite one."

(See R. 661, 664.)

"Repricing". The nearest to a direct criticism of any Price Interpretation of the Institute contained in the Court's Findings relates to the so-called practice of "repricing". Repricing occurs when a refiner applies a newly announced reduced price to orders previously taken at a higher price. Before the Institute, such repricing had occasionally been done, and orders taken early on a day when a price decline was announced later on the same day were given the benefit of the lower price. Since this repricing had sometimes been used to conceal discriminatory concessions to favored customers, the Institute, for a few months after its organization, had in effect a Code Interpretation condemning it, but in August of 1928 a new Interpretation was issued as follows:

> "* * * The custom of the trade permits giving the customer the benefit of the refiners' lowest price during the day, that is, a contract entered into on

> sugar delivered in the morning may be repriced at any lower price announced during the day" (Finding 44, R. 275).

With respect to this provision, the Trial Court finds as follows:

> "* * * Repricing has been practiced at least since August, 1928. Although expressly sanctioned only as to business of the day of the decline, refiners occasionally have repriced beyond that period. But the 'Interpretation' just quoted was evidently intended to prevent this and must have had some effect in discouraging it" (Finding 44, R. 275).

In view of the facts disclosed by the Record, this criticism is wholly unwarranted. It was never the custom of the trade, prior to the formation of the Institute, to reprice business entered prior to the day of a price decline (R. 634). The Trial Court, in fact, found that repricing occurred "when a decline was announced late in the day, and was applied to all of *that* day's business" (Finding 44, R. 275). The Interpretation recognized expressly that very practice. The finding that the Interpretation must have had some effect in discouraging repricing is particularly difficult to understand in view of the fact that, since the inclusion of this provision in the Code Interpretations, refiners have, in fact, occasionally repriced business taken long prior to the day of the decline, a practice which had never prevailed in the pre-Institute period.

Examples of such repricing are shown on Exhibit O-3, for 1930, printed in the Appendix to this brief, when by successive public announcements repricing involving 20 cents a bag was extended by all refiners back from February 10th to January 6, 1930 (R. 676-7); and again on Ex-

hibit O-3 for 1931 (Appendix), there appears a repricing involving 10 cents a bag by successive public announcements of refiners which was extended back from December 1st to November 17th. These were fiercely competitive contests and in this form they were unprecedented in the days before the Institute, so that there is no foundation for the Court's criticism that the Code Interpretation on this subject was intended to and must have had some effect in discouraging repricing. What the Code actually did was to insure that repricing should be done publicly, with the benefit extended to all customers alike, and not done secretly, for the benefit only of the concessionaires.

General Effects of Institute's Relaying Price Announcements. The Institute's system of relaying price change information has not served to make available price information which was not previously available and current, nor to make that information available to the refiners at a time earlier than it was otherwise available. It has served, however, to achieve the most widespread publicity possible for the announcements and to insure the accuracy of the publicity, which is of prime importance. The announcements of price changes, including as they frequently do complicated conditions and terms and specifications of limited territory, are easily distorted and misunderstood and the Institute's system insures the publicizing of the ungarbled text of the announcements (R. 637).

No Price Agreements or Collusion among Defendants. The price publicity system of the Institute has functioned as intended, with no concealed or ulterior appurtenances, as a simple, direct and open manner of informing everyone interested in sugar prices, promptly and accurately, of each and every price announcement of every refiner. That it has not been used for any collusive purposes is substantially

undisputed and is clearly set forth in Findings 48 and 201 (R. 277, 310):

> "48. I find that the refiners did not consult with one another after an advance had been announced by one of them and that the grace period was not in fact used by them to persuade a reluctant member to follow the example set, despite the business necessity of withdrawing an advance unless it were followed by all."

> "201. I find no agreement among defendants on basis prices in the sense of an agreement to adopt a certain basis price from time to time and to maintain it during any period. Frequently an announcement by one refiner of an advance would result in a series of announcements by others, ultimately leading to a decline. Often, too, the advance would be withdrawn because one refiner would refrain from following the announcement. Except in few instances, a decline announcement was followed by all."

D. The Trial Court's Fundamental Error as to Price Announcements.

With a proper understanding of the historic marketing methods and moves of the sugar trade, and of the fact that the Sugar Institute made no change in that system, but merely abolished the secret concession practices which were undermining the system, the error of the Trial Court's basic Finding on this question becomes apparent. The Court found:

> "56. The agreement to sell only on prices, terms, and conditions announced in advance of sales, the

actions pursuant thereto, and the reporting system in aid thereof, constitute undue and unreasonable restraint of trade" (R. 279).

Defendants did not in terms agree to sell only on prices and terms announced in ADVANCE OF SALES.

It should first be noted that neither the Code principle, that "sugar should be sold only upon open prices and terms publicly announced", nor any of the Code Interpretations (pp. 55-6, *supra*), called *in terms* for any price announcement *in advance of sales.* So far as the language of the Code principle and Interpretations is concerned, they would be complied with equally well whether the price and terms of sugar sales were announced before or after the sales.

Announcement of Move Prices. As to sales on moves, which are precipitated by announcements of an impending price advance, the Code principle and price announcement Interpretations of course worked out in actual practice into sales only on prices and terms announced in advance of sales, *because of the very nature and conditions of a sugar move.* Both the future advanced price and terms and the present lower offering price and terms had to be made public in advance of sales, or there would have been no move and therefore no sales. If any single refiner failed to announce the advance for the time announced by the others, the move did not take place (R. 636, 698, 707). Or if any single refiner announced a present lower selling price or better terms than those offered by the others on the move, they all had to announce that lower price and better terms or sell no sugar and so they all *did* announce them (R. 646, 685). These announcements in advance of sales were therefore the result of the immemorial practice of the trade.

They were a part of the very nature of sugar moves and were not the result of any action of the Sugar Institute or of any agreement of the defendants.

It should further be observed that so far as the Code Principle and Interpretations were concerned, any refiner was free at any time to abandon the system of selling on moves. He could simply refuse or fail to announce any price on any move and individually inaugurate the plan of selling his sugar only on the basis of his own list prices publicly announced.

As the evidence showed and the Court found (p. 62, *supra*), refiners often did defeat attempted moves by failing to make any announcement at all, or by announcing a decline not accompanied by an announcement of a subsequent advance, but these were, of course, only competitive attacks on other refiners and on particular moves.

For the reasons discussed on pages 65 to 68 below, no refiner attempted to destroy the move system itself.

Announcement of Day-to-Day Prices. As to the small day-to-day sales between moves, it was probably the general understanding of the refiners that strict technical observance of the principle of selling "only on open prices and terms publicly announced" would require that public announcement should be made of a lowered price or better terms *before* any sale was made at such price or terms, but there is no evidence as to what was the *actual practice* of the individual refiners in this regard. It is extremely doubtful whether any refiner felt that he was guilty of any real infraction of the Institute principle merely because he failed to hurry to his bulletin board and post a new price before he gave it to any customer. Their relations with the Institute were much too loose for that. Some of them may

have followed one practice and some the other, and probably none of them followed any consistent practice in this matter, because it made no real difference either way.

Some light is thrown upon it by the repricing Interpretation (discussed at pp. 59-61, *supra*), which recognized the established practice of the refiners to give the customer the benefit of the lowest price during the day, so that contracts entered into earlier on any day were repriced to reflect any lower price announced on that day. In the face of this custom, it would obviously be a matter of indifference whether a reduced price or better terms were announced *before* or *after* the actual sale, if it was publicly announced so that all could take advantage of it. And, as we have seen (pp. 60-1, *supra*), during the Institute the refiners sometimes repriced all their sales extending back for weeks prior to their announcement of a lower price.

The Institute continued under the move system, because it is a natural growth essential to the economic conduct of the sugar business.

The refiners, when they organized the Institute, did not attempt to tear this established move system up by the roots and construct a new system. The system is a natural growth. It has grown that way because the nature of the business demanded it. The cost of raw sugar makes up approximately four-fifths of the cost of the sugar sold by the refiners (R. 938). Raw prices fluctuate widely from day to day and substantially control the selling price of refined. Wholesale and retail distributors sell it on a very narrow margin, a margin of 5 or 10 cents a bag on a selling price of approximately five to seven dollars (R. 472, 399).

They cannot afford to stock large supplies of it, because of excessive storage costs, because of danger of deterioration, because of the disproportionate amount of the investment compared to the margin, and because the constant and wide fluctuations in the price make the carrying of large stocks too hazardous. Fluctuations of ten or fifteen cents a hundred pounds in a month are regular experience, and fluctuations of twenty or thirty cents a month are not uncommon, thus often wiping out the distributors' margin several times over (R. 386, 589; Ex. O-3).

On the other hand, *the distributors have to buy* considerable quantities of sugar at a time in order to take advantage of carload freight rates and handling costs. The difference between the carload and l.c.l. freight rates and handling costs is much larger than the distributors' margin. Hand-to-mouth buying is therefore generally impossible and would be impracticable anyway, because the hand-to-mouth buyer cannot regularly compete on resales with those who have bought on monthly swings in price.

The resultant of all of these conflicting forces is the system of buying on moves every month or two. Both large and small dealers have adapted themselves naturally to this system, and both large and small dealers are essential to the economic distribution of sugar. Under this system they can all readily keep track of the market through the trade journals and brokers. They can take advantage of carload rates and can afford to carry enough sugar to last from move to move, without too high a carrying cost *and without too much jeopardy from fluctuations in price.* With the trade generally buying on moves, they are all on an equal footing as to the periodic fluctuations in price.

On each move they have all laid in a supply for a month or more (R. 671, 705-6). If, before the supply is gone, the refiners' price declines, the distributors must all take relatively the same punishment if any one of them in a given competitive area drops his price. If the refiners' price goes up, the distributors cannot advance the price on their stocks on hand unless all their competitors do so. The result is that, in each competitive distribution area, distributors' prices between moves are held to a generally common level by the natural forces of competition. That level is so low that the distribution function is ordinarily performed without substantial profit and often at a loss (R. 396, 597, 817-8), but it is not so low that the losses due to fluctuations in refiners' price are disastrous, since all distributors are in the same boat, and having bought their current supplies at the same general market level must sell out their current supplies with due regard to that level in order to avoid crippling losses from an intervening decline.

This latter element is one of the greatest economic advantages of the move system. With monthly fluctuations in the refiners' price regularly equaling or often greatly exceeding the distributors' entire margin, one of two things had to happen. Either the distributors would have been compelled to raise their general level of margins in order to protect themselves against the hazards of these frequent disastrous drops in price, or a system of marketing had to be developed under which that hazard would be minimized, so that the distributors could afford to handle sugar on a fairly regular minimum margin, without too much danger of loss.

The natural forces of competition decreed that the latter alternative should develop, and the result was the system of

marketing sugar on moves. With all refiners bidding for the same trade at the same time, by the open announcement of their prices and terms, refiners' margins have been forced down through the years to a minimum where their average return on their capital investment is less than 5 per cent. (Ex. E-17), as contrasted with over 10 per cent. for other manufacturing industries (R. 1167). With all dealers buying a month's supply or more at the same time and at the same general market level, competition in each area and sub-area of distribution holds the distributors' price to the level of the one who sells the cheapest, with the result that sugar has for many years been a "loss leader", one of the articles commonly sold by distributors at a loss in order to attract trade for other articles that can be sold at a profit (R. 396, 399, 597, 817-8).

The Alternatives to the Move System. There are two possible alternatives to the move system of marketing sugar. One is an established and generally recognized system of secret concessions. The other is the system contemplated by the Trial Court's Findings and Decree namely, announcement of all prices and terms immediately *after* sales. Let us briefly examine each of these alternatives with special reference to their relationship to the move system of sugar marketing.

1. *The Secret Concession System.* Secret concessions were aimed at the heart of the move system. What the concessionaires wanted was to get away from the necessity of buying their sugar at the same time and price, and on the same terms as their competitors. Buying on the straight basis of the refiners' publicly announced prices and terms for the move, they could make no substantial profit on their sugar sales, because competition forced all of the

distributors down to a minimum profit or a loss basis. But if they could get secret inside prices or terms, or could buy or handle their sugar so that they could avoid losses from sugar price fluctuations, they would thus be able to meet or beat their competitors' prices and still make a profit for themselves.

Thus there grew up all the furtive devices by which the concessionaires defeated the effects of the move system. They bought at lower prices and on better terms than those publicly announced by the refiners for *all* purchasers, and by direct secret agreements or by dishonest storage and brokerage handling arrangements with the refiners they dated their purchases *back* when the refiners' prices went up, and they dated them *forward* when the refiners' prices went down (R. 1051-2, 1054-6). The only reason these secret concessions had not defeated the move system altogether was because, while generally *suspected*, their nature and extent had not become actually *known* to the majority of the buyers at the time the Institute was formed. But they were well on the way to the complete destruction of the move system, because that system depended upon the general belief that the refiners' public announcements for a move meant what they said and that sugar could be presently purchased at a certain lower price and on certain terms, and would advance at a fixed hour to a higher price or less advantageous terms. At the rapid rate the concession system was spreading the hoax would soon have been publicly exposed and the system of selling sugar on moves would have had to be abandoned.

As we have seen, the Trial Court found that the concession system was evil and should be destroyed (Finding 29, R. 271), but the remedy suggested by the Court

would have been equally fatal to the established system of selling sugar on moves and would have destroyed the benefits to the trade and the consumers that had grown out of that system and were dependent upon it.

2. *The Trial Court's Proposed Remedy.* The Court's proposal on this point is stated in Finding 53 as follows:

> "53. Competition among sugar buyers was so keen that when a discrimination in favor of one became known, others similarly situated would ordinarily bring pressure to secure like favorable treatment. Either they would have succeeded or the discriminatory favor would have had to be withdrawn. It is reasonably certain that immediate publicity given to the prices, terms and conditions in all closed transactions, which is not shown to have been impracticable, would in general have resulted in preventing any unfair competition caused by the secret concession system, without an agreement to sell only on the basis of open public announcement in advance of sales" (R. 278-9).

In the pertinent portions of the Opinion (R. 238-41), the substance of the Court's argument on this point is that the secret concession system was admittedly uneconomic and unfair; that it resulted in widespread discriminations and fraud, and that the defendants were justified in concertedly adopting reasonable measures to put an end to it. But the Court argues that the system could have been abolished by an agreement among the defendants to give "immediate publicity to the prices and terms of all *closed* transactions" just as effectively as by the agreement "to sell only on prices and terms announced in *advance* of sales". The reasons for this Conclusion stated in the Opinion are

summarized in Finding 53, quoted above (p. 70, *supra*) to the effect that if immediate publicity had been given to prices and terms in all closed transactions, competitive pressure would have been so great that the refiners would either have had to abandon the discriminatory concessions or extend them to all.

We think this statement of the Court is correct. It is *publicity* that prevents discriminatory concessions and not the sequence in time between the sale and the publicity. Public announcement of all prices and terms either before or immediately after sales inevitably means that discriminatory concessions will not be given.

A fundamental objection to the Court's proposal is that it is not adaptable to the sugar industry. In an industry which has traditionally and for good reason sold its product on moves, through the mechanism of announcing price changes in *advance* of sales in order that the buyers may have an opportunity to buy before the price rises, it is not helpful to suggest a system of announcing price changes *after* sales. The advantages to sugar buyers of the move system are apparent and were recognized by the Court. Unless that system is to be supplanted by some system less advantageous to the buyers, price changes must be announced *before* rather than after sales.

As one of the major purposes of publicly announcing prices, either before or after sales, is to eliminate secret concessions, that plan of price announcement should be accepted which is most appropriate and advantageous to the trade concerned.

Since either plan prevents such concessions, is there any reason why the plan proposed by the Court should be held lawful and the other plan unlawful? Let us examine the facts and see.

Individual Bargaining versus General Public Offers. Apparently what the Court had in mind was, (*a*) that individual bargaining would be more likely to develop under a system of announcing prices and terms immediately *after* the sales than under a system of announcing them *before* the sales; and (*b*) that a system of individual bargaining between refiners and buyers would be economically more desirable than a system of general public offers to the trade by all refiners.

We think it is clear that the Court was wrong in both of these assumptions.

(a) *Would individual bargaining be more likely to develop if prices were announced after sales instead of before?*

The answer to this question is that, in the marketing of a thoroughly standardized product like defendants' sugar, individual bargaining will not be generally practiced under *any* system of public announcement of prices and terms, whether the announcements are made before sales or after them. The Court's own reasoning and Findings demonstrate why this is true.

The first step in that reasoning is based on Finding 17 (R. 269), reading as follows:

> "17. * * * *Both before and since the Institute,* in sales by refiners to manufacturers of products containing sugar, which account for about one-third of the sugar consumed, *price, not brand,* was always the vital consideration; and in sales to the remainder of defendants' trade, one refiner could not ordinarily, by virtue of preference for his brand, obtain a higher price *except insofar as another refiner*

might be giving a lower price by secret concessions. I find that the basis prices quoted by the several refiners in any particular trade area were generally uniform both before and after the Institute, because economically the defendants' sugar, save for exceptional instances was and is a thoroughly standardized product."

This uniformity referred to by the Court means uniformity in "terms" as well as price because, as the Government itself contended, whenever a difference in terms is *material,* it is equivalent to a difference in price.

Where competition is free and the prices and terms on which a thoroughly standardized product is sold are *known* to the trade, whether publicly announced or not, and whether made known before or after the sales, those prices and terms will inevitably be uniform in each competitive area (*Cement* case, 268 U. S. 605-6; see also various statements of this principle by twenty-five leading economists in Ex. G-17). The reason for this is plain. No buyer will pay one seller more for such a commodity than another seller is known to be selling it for. It is simple human nature for him to demand the same price, and economically he must have it or suffer a disadvantage in his struggle with his competitors. And no seller of such a product as sugar dares to leave his customer in a position of disadvantage, in a given stage of the market, as against the customer's competitors, by refusing to price or reprice on the basis of the best price and terms given by himself or his competitors and known to the customer. As the evidence showed and the Court found, a difference in price of even one or two cents per hundred-pound bag of sugar is controlling (Opinion, R. 221), and for the same reason any

material difference in terms, such as rate of discount, freight absorptions, switching charges, guarantee period, and the like, would also be controlling. No sugar buyer would continue to deal with a refiner if the refiner did not protect him by giving him prices and terms as favorable as were being obtained by others in the same competitive area from any refiner.

The second step in the reasoning follows inevitably from the first. Under any system of publicly announced prices and terms for a thoroughly standardized product, individual bargaining will be practiced by a buyer only in the very exceptional case where the terms he seeks are so specially adapted to his own particular situation that they would not be sought by his competitors.

In such rare cases, of course, individual bargaining would be just as likely to be practiced if the terms were to be announced before the sales, as if they were only to be announced afterward. The buyer would not hesitate to ask for them and the seller would not hesitate to grant them. Both would know that they were negotiating a bargain that was really individual, in the sense that it was suitable for, and would therefore be sought by, only one or a few buyers. Its terms, when negotiated, could therefore be announced before the sale was actually concluded, with the assurance that no discrimination against other buyers was involved, and that neither buyer nor seller would be embarrassed or prejudiced by advance public knowledge of the terms of the offer.

But, of course, the situation is different where the terms involved are not really exceptional and individual, where granting them to one or a few and withholding them from others would amount to a real discrimination. Low prices,

low freight rates, favorable credit terms and the like, are equally desirable to all buyers, and if one is known to get them, all others will demand and get them. The seller will not grant them to one buyer unless he is willing to grant them to all. The buyer will therefore not undertake individual bargaining for them because he knows that he would not be likely to get them and that they would do him no real good if he did get them. His competitors would likewise get them and he would be no better off than before. Both buyer and seller would know that any individual bargain the seller made with the buyer would be equivalent to an offer of the same terms to the entire trade.

The manifest conclusion is that individual bargaining for such reductions in price and advantages in terms will not be practiced under any system of publicly announced prices and terms, and that the system of announcements after sales, as proposed by the Court, therefore has no advantage over the system of announcements before sales, so far as the promotion of individual bargaining is concerned.

But let us suppose that the system of individual bargaining envisioned by the Trial Court *could* be realized under the plan he proposes. Is there any reason to believe that such a system would be better than the system under which the Sugar Institute operated?

(b) *Would a system of individual bargaining be economically more desirable than a system of general public offers to the trade?*

The Trial Court's assumption that individual bargaining would be economically more desirable than a system of general public offers to the trade, such as the sugar move

system, is clearly wrong. While it is true, as we have pointed out above, that *individual* bargaining is not practiced under any system of publicly announcing prices and terms for a standardized product, this does not mean that there is no bargaining at all. The bargaining is mass bargaining and not the individual haggling of the horse trader. Professor Seligman testified (R. 1143):

> "The absence of individual dealings and dickers, whether open or secret, between particular buyers and particular sellers does not indicate that the buyers are not exerting influence on the price in accordance with the requirements of economic conditions. On the contrary, I should say that the force of this massed feeling on the question of whether the price ought to made lower would be a very much stronger influence than the opinion of any one or series of individuals under a system of private dickers."

Mass bargaining is, in fact, a far more effective means of forcing a reduction in price than the system of special deals and private dickers. The buyer who is able to obtain an inside cut or a special price is not interested in bringing pressure to bear to force a general reduction in price. Consequently, as shown by the testimony, *"the pressure is greater at the present time than it was before the Institute"* (R. 1154).

Most sugar buyers buy through brokers, who are market experts and who were described by one of the refiners as "the best informed class of buyers of whom I have any knowledge". If the brokers and other alert dealers in the trade think current prices are higher than conditions warrant, they quickly and loudly make their opinion manifest. The small current of day-to-day buying that would other-

wise be flowing dries up and the refiners are deluged with the complaints of the trade. If other terms are unfair a flood of criticism pours in. As the testimony shows, constant pressure was exerted upon the refiners by the brokers to secure more advantageous prices and terms for their customers "by a continuous hammering away at the refiners with statistics or information of any kind * * * which tended to show that the price was too high" and by customers through a concerted refusal to buy (R. 1154).

Competition among the refiners insures a quick response to these complaints and criticisms and to all changes in market conditions which warrant a price decline or the granting of better terms. As shown by Goetzinger's testimony (R. 676-7), the price decline announced on February 10, 1930 and eventually made retroactive to January 6, 1930, accompanied by the costly repricing of all contracts entered during this period, was the direct result of complaints made by buyers. The refiners' chief asset is the good will of the trade and there is a strong competitive rivalry among them to cultivate that good will by being first to announce declines and attractive terms.

Just how this mass bargaining works through competitive offers by refiners of price declines and attractive terms under a system of openly announced prices and terms will be seen from an examination of Exhibits N-3 and O-3, printed in the Appendix to this brief. In studying the charts in Exhibit O-3, it is to be remembered that they have been simplified for the purpose of showing price changes only, changes in terms being so complicated that it is not practicable to chart them.

For the Court's convenience, and to supply explanatory detail which could be developed only by a careful study of

the Exhibits in connection with the testimony in the Record, we will analyze typical examples of open price change competition shown by these and the other relevant Exhibits.

(1)

We first refer to the price changes of April 2 to 5, 1930, shown on Exhibit O-3 for 1930, and the corresponding abstract of the announcements for those dates shown in Exhibit N-3.

On March 4, 1930, the refined price had declined from 4.95 to 4.85, and on March 7th it dropped still further to 4.70, despite the fact that the raw price had risen from 3.49 to 3.64 between March 5th and March 7th (Ex. O-3 for 1930). With the apparent margin only .981, the trade saw sugar was a buy at 4.70 and booked a total of nearly 15,000,000 bags on the March 7th move, an almost unprecedented volume of sales at that time of the year with the start of the heavy consumption season at least three months away (Ex. O-3, R. 649). Commenting on the March 7th move, Willett & Gray states:

> "The keen competition in refined sugar noted last week, resulting in freight concessions, cartage allowances, etc., has come to an end but this did not happen until the various irregularities resulted in a general decline to 4.70c basis which occurred on Friday, the 7th inst. This price brought such a heavy demand for refined sugar that all the refiners, with the exception of Revere of Boston, advanced their basis to 5.00c at the opening on Saturday, March 8. Revere allowed further purchasing at the 4.70c basis up to 12 o'clock noon on Saturday at which time they, also, advanced to 5.00c basis" (Ex. 18, p. 138).

The extent to which a great number of buyers had overbought on this move because of the attractive price at which

it had taken place is evidenced by the fact that at the end of the month of March approximately 6,000,000 bags were still undelivered (Ex. M-15, R. 649). At the same time other buyers had either underestimated their requirements (R. 649), or had failed to take as full advantage of the bargain as their competitors, and therefore wanted *more* sugar at the bargain price so as to be in a position to compete. Normally such a situation would be adjusted by resales by those who had overbought to those who had not bought enough. However, the situation here was not normal, the raw price having held, being still 3.64 at the end of March (Ex. O-3).

National, in an apparent attempt to correct the situation which had developed and to protect those of its buyers who had not taken full advantage of the March 7th bargain, made the following announcement on April 2nd:

> "In view of the announcement made by us when the March 7 contracts were entered we wish to advise brokers that as has always been our policy to treat the trade fairly and give their interest every consideration, we will extend the time of delivery to March 7 contracts beyond the 30 days. On the market change of March 7 we notified brokers that in placing their orders with us they keep in mind that the sugars must be delivered within the terms of the contracts, or 30 days, and a great many will live up to these terms. In view of this we will increase contracts of buyers who did not purchase as much sugar as they otherwise would have had they understood the delivery would be spread over a period longer than 30 days. The extra quantity to be entered will be based on the amount of sugar they will take up to and including April 17, specifications for delivery or shipment to be furnished at the time the contract is increased, all such increase quantity to be subject to our acceptance.

> "We are taking this action in order to be fair to both brokers and buyers who have been governed by our various announcements in the past regarding delivery in 30 days" (Ex. N-3).

National's announcement on April 2nd meant a drop of 30c in the price of refined. There had been no substantial change in the raw price since March 8th and great pressure must have been brought to bear on National by their customers to cause them to make this announcement.

Arbuckle, immediately on the alert and apparently sensing an attempt on the part of National to steal a march on the other refiners by an offer of a new and special type of bargain to customers who were short of sugar, promptly "went National one better" by announcing the same reduction to *all* buyers, in the following terms:

> "Subject to instant change without any notice whatever we will consider orders at basis 4.70" (Ex. N-3).

Three other refiners, led by Pennsylvania, likewise announced "Our price 4.70 all orders subject to confirmation" (Ex. N-3). National then made the same announcement, thus broadening its original offer.

Here was no ordinary drop in price. The refiners merely said that they would *consider* any business submitted to them. The usual terms are "we will accept". They wanted to see what they would be called upon to do before they committed themselves.

The next step was taken by Spreckels, which company, by excluding the mid-west guarantee territory, limited the consideration of contracts to the eastern area where National did most of its business. Spreckels obviously had no desire to hand out 30c a bag where it did not have to, and was soon joined by Pennsylvania in limiting the territory (Ex. N-3).

Neither of the western refiners and only one of the southern refiners made any announcement. This is significant as usually a decline is followed promptly by all. Their silence indicated that they were probably contemplating a counter-attack, as proved to be the case.

By the end of the day of April 2nd, all eastern refiners, with the exception of Arbuckle, who did not sell in the west, had announced that they would consider business at 4.70 *only in the eastern part of the country.* On April 3rd, the western refiners announced that they would extend for 30 days the time for withdrawal of the March 7th contracts, and would reduce their price to 4.85, less a 15c freight allowance—net 4.70—*to all buyers in all territories.*

In spite of their obvious reluctance to take this step, and of National's initial effort to limit the buying to those customers who were out of sugar, and in spite of the efforts of some of them to limit the reduction to the eastern states only, the eastern refiners, as well as all others, had followed C. & H.'s lead before the end of the day, and thereby extended the reduced price of 4.70 to the entire country (Ex. N-3, O-3).

(2)

The Price Decline and Guarantee Extensions of June 3rd to 9th, and the Spiked Advance of June 10, 1930.

It should be explained that the "guarantee" is a special form of sugar contract whereby the refiners guarantee the purchasers against any decline in price within a limited time, usually 30 days after the date of the contract. This guarantee contract has always been confined to a limited portion of the country, mainly certain mid-west territory, where transportation and competitive conditions are such that this form of contract is especially attractive to buyers.

On June 3, 1930, when the current price of sugar was 4.70 (Ex. O-3), Imperial, a southern refiner, made the following announcement:

> "Effective opening of business June 4 reducing list to 4.50 basis prompt or 30 day contracts regular terms" (Ex. N-3).

Godchaux, a southern refiner, immediately announced the same decline, and also announced:

> "We extend our guarantee form of contract to cover all states."

Throughout the following several days, all refiners announced the decline but made many conflicting announcements as to the extension of the guarantee territory. The southern refiners, whose selling territory was mainly limited to the south and lower Mississippi Valley, had started this contest by broadly announcing the guarantee for all territory, but that announcement carried no threat to the western refiners in their own western territory not reached by the southern refiners, nor to the eastern refiners who had little competition from the southern refiners in the territory generally north of the Ohio River and east of Indiana. Their guarantee announcements, therefore, generally limited the extension of the guarantee to the territory where the southern refiners were real competitors with them.

The Arbuckle company, which did not compete in the traditional guarantee territory and had therefore never issued the guarantee form of contract, then launched a counter-attack against the southern refiners who were thus attempting to extend the guarantee form of contract into territories where Arbuckle competed with them. Arbuckle announced in substance that its price "would be 5c per hundred pounds below the selling price of any competitor who guarantees against decline". Since buyers generally do not regard the guarantee as being worth to them as much as 5c a bag, this counter-attack was effective and led to the withdrawal of the guarantee offers by other refiners in territory outside that where it had customarily been given.

While this fight over the guarantee was going on, all the refiners had, of course, promptly followed Imperial's an-

nouncement of the decline to 4.50, and Revere then, on June 6th, announced an advance from 4.50 to 4.60, effective at the opening of business June 9th, thus attempting to precipitate a move at the reduced price of 4.50. This was followed by Spreckels and Savannah. American announced the advance to 4.60, but postponed the effective date to the opening of business on Tuesday, June 10th. This was followed on June 6th by eleven other refiners. But before the effective date of the advance on Tuesday, June 10th, C. & H., on June 9th, announced:

> "Do not advance our price Tuesday our opinion no advance justified under present conditions and particularly in view of raw market", (Ex. N-3).

On June 9th, Colonial thereupon withdrew their announcement of the advance, as did all the other refiners who had announced it.

The two foregoing examples are typical of the type of competition, by public offer and counter-offer, which was carried on throughout the Institute period. That this mass bargaining of open competition is effective to produce a proper economic level of prices is the teaching of economic science, as testified to in this case and as stated in the writings of economists (R. 1126-9, 1132-3; 1159). And that it was completely effective, during the Institute period, to hold the level of prices, margins and profits to substantially the same level as before the Institute, will be seen from the discussion on pages 89 to 103 below.

The Trial Court's Two Remaining Arguments.

There remain to be discussed only two more suggestions advanced by the Trial Court to support its Opinion that a system of announcing prices and terms immediately after sales is economically more desirable than a system of an-

nouncing them before sales, and that competitors may therefore lawfully agree to adopt the plan he favors, but may not lawfully agree to adopt the other. Both of these suggestions are contained in Finding 52 (R. 278) as follows:

> "52. The assurance to each refiner that no competitor would vary his prices without advance notice tended in fact, as it naturally would tend, toward maintenance of price levels relatively high as compared with raws."

1. Does a system of announcing prices in advance of sales *tend naturally*, as the Court declares, toward maintaining higher prices than would be maintained under the Court's proposed system of announcing prices immediately after sales?

The Court's affirmative answer to this question is a pure assumption. Nowhere in his Opinion or Findings does he attempt to give any reasons supporting this assumption, except such as may be implied from his apparent belief, which is clearly a mistaken one (pp. 72-5, *supra*), that individual bargaining would be practiced if prices were announced after sales but would not be practiced if they were announced before sales. Is there any other support for the Court's assumption of such a natural tendency?

Perhaps the Court thought that a refiner would be more likely to reduce the price if he did not know whether one of his competitors had already reduced it than if he knew that it had not been reduced. This is a teasing thought but clearly a mistaken one when applied to the alternative the Court was considering, namely, a system of announcing prices before sales, as against one of announcing them immediately afterward. This difference of a few minutes in the time when a refiner learns of his competitors' action

cannot be a material factor in determining the trend of prices. Under both these systems of price publication the refiner has the assurance that he will know his competitors' price within a few minutes, or at the most an hour or two, of the time when it is applied to a sale. Whether he learns it before or promptly after such a sale makes no difference, because in either event he has ample time to meet it with a similar announcement of his own. If in the short interval of his ignorance he has made a sale or sales, he will, of course, reprice them.

The only system under which ignorance of a competitor's price might tend to induce price declines would be one where the seller could not learn his competitors' price until too late to meet it. He might then be led to reduce his price for fear his competitors would steal the market by reducing their price before he could learn of the reduction and meet it. This would be a sort of "blind-man's-buff" market. We do not know of any such system, except perhaps a strict secret concession system with no price publication whatever and with competitors learning of each other's prices and terms only through rumor and the tales told by the buyers.

All economists concede that such a system is evil and economically unsound and that the best and only way to insure that prices will be held at their proper economic level, neither too high nor too low, is to provide for complete and prompt publicity of all market conditions, including, of course, the prices offered by all competitors in the market. Those are the conditions which produce the economically ideal markets of the stock and commodity exchanges, and all sound systems of price publication are designed to produce the nearest practicable approximation

to such conditions which can be realized in the industry concerned.

We submit, therefore, that the Court is wrong in his theory that a *little* ignorance of market conditions would be a good thing in that it would tend to reduce prices, and that it is therefore lawful for competitors to agree to announce their prices immediately after sales but not before sales. The Court overlooks the fact that the short interval of ignorance he proposes would not accomplish the result he favors. He also wrongly assumes that a mere tendency *to reduce prices* would be sufficient to justify the device of withholding price announcements until after the sales were made. Economically, prices may be too low as well as too high. They often *are* too low. Economists believe that the price level which is produced by prompt and complete knowledge of all market conditions, including the current *offers* of competitors, is the proper economic level.

2. Did the announcement of prices before sales as practiced by defendants *actually tend* toward maintenance of refined price levels relatively high as compared with raws?

The cap sheaf of the Court's argument in support of his decision that a concerted system of announcing prices immediately after sales would be lawful, whereas a concerted system of announcing them before sales would not, is his assertion that "an assurance to each refiner that no competitor would vary his prices without advance notice *tended in fact* * * * toward maintenance of price levels relatively high as compared with raws."

The Court does not refer, either in his Opinion or his Findings, to any *facts* directly supporting this assertion,

unless he intends the following portions of his Findings and the corresponding paragraphs of his Opinion to provide such support:

> "* * * In the post as compared to the pre-Institute period there was a marked increase in margin and a substantial increase in profits despite a concededly large excess capacity.
>
> "I find that in the post-Institute period such higher level for the price of refined as compared to that of raws has been maintained, as to negate the prevalence of free competition" (Opinion, R. 223; Findings 202-3, R. 311).

The first obvious mistake in this part of the Court's argument is the implied assumption that pre-Institute conditions as to prices and profits were substantially the same as would have prevailed if there had then been in effect the system of announcing prices immediately after sales, which the Court decides it would have been lawful for defendants to concertedly adopt. The prices and profits prevailing before the organization of the Institute were those produced by the then prevailing system of secret concessions, with the refiners not bound to any public price announcements at all, and with discriminatory practices and fraud and deceit running wild. The Court himself finds that his proposed plan of announcing prices immediately after sales would have abolished these secret concessions and discriminations. Can it be assumed that these evil practices had no effect at all on the level of prices and profits? Is it to be assumed that the level they produced is the proper economic level? Or that the plan of price announcements proposed by the Court would have produced the same level as the pre-Institute level? Why, then, is it

logical for the Court to condemn defendants' price announcement plan because of its alleged failure to produce a level of prices and profits as low as the one which prevailed before the Institute?

For the reasons suggested by the obvious answers to these questions the defendants do not fear the results of a fair comparison of the level of prices and profits during the Institute period with the level which prevailed before. Even if it were true, as the Court asserts, that the level during the Institute was substantially higher, the Government's case and the Court's Decree would not thereby be sustained.

On the other hand, if the Court's assertion is not true, and if the level of prices and profits during the Institute was substantially the same as before, the Court's decision must fall. This assertion of the Court is the substructure of the entire decision. The only thing in the entire case which approaches the nature of *evidence* that the activities of the defendants actually tended to and did restrain lawful competition is the alleged evidence that prices and profits during the Institute were higher than before. Beyond that, the alleged tendency and effect of defendants' activities rest merely upon the Court's own *inferences*, which are of the same general character as those we have analyzed on pages 62 to 86 above, and which we believe are mere assumptions, without any sufficient basis in fact or reason.

It is admitted by everyone that competition before the Institute was completely free and unrestrained. The Government has contended throughout that the conditions then prevailing, including the concession system, constituted full and free competition at its economic best. Refiners and distributors alike fought each other with every weapon they

could lay their hands on, including the entire armory of frauds and lies and contemptible deceits. The resultant level of prices and profits represents a minimum which certainly could not be achieved under any system which (to use the language of the Court in describing the general nature and effect of defendants' activities) "tended to and did unduly and unreasonably restrain and suppress competition".

The Government's case must therefore fail if it should appear that under the open competition fostered by the Institute prices and profits were driven down to substantially the same level as before the Institute. We expect to show this Court that that is exactly what happened.

E. Relative Prices and Profits in the Periods Before and During the Institute.

The Alleged Higher Price Level.

It should first be noted that the alleged higher price level referred to by the Court does not mean that sugar prices received by the refiners after the organization of the Institute were *actually higher* than before. It is conceded that they were actually much lower. In 1925 to 1927, the three years before the Institute was organized, they averaged 5.46 cents per pound, while in the three years after it was organized, 1928 to 1930, they averaged 4.88 cents per pound; and in 1931, the last year before the trial of this case, they were still lower, averaging 4.30 cents (Ex. S-17, p. 1, Appendix hereto).

However, this actual reduction in the price of refined sugar during the Institute period was in the main due to a

reduction in the price of raw sugar, and the Court's assertion that there was a *tendency* to a higher price level for refined is based on the fact that the refiner's "margin"—the difference between the price paid by the refiner for raw and the price at which he sold refined—averaged .977 cents in the period from 1925 to 1927, and 1.020 cents in the period from 1928 to 1931, an increase of .043 or less than one-twentieth of a cent per pound in the period after the Institute was organized (Ex. S-17, p. 1, Appendix hereto). These figures will be discussed in more detail later. Before coming to that discussion, the major factor which determines changes in refiners' margins should be briefly explained.

Price Inertia—"Lags" and "Leads". Raw material prices are always more sensitive to changes in market conditions than the prices of the finished materials manufactured from them. There is thus a considerable interval between a rise or fall in the price of the raw material and the resulting rise or fall in the price of the manufactured product. In the language of the economists, the inertia of processors' prices results in a "lag" between a rise or fall in the price of the raw material and the consequent rise or fall in the price of the finished product. Stated conversely, the raw material price "leads" the price of the finished product by a considerable interval. We cite in the footnote a few of the statements of leading economists about this relative inertia of finished goods prices.*

As a consequence of this common and accepted tendency processors' margins and profits usually fall in periods when the price of their raw materials has thrust

*Wesley C. Mitchell, Professor of Economics in Columbia University, describes this principle in his book entitled "Business Cycles"

sharply upward and rise in periods when their raw material prices have dropped to a lower average level. This tendency is especially marked in the cases where the cost of the raw material constitutes a very large percentage of the price of the finished product, and refined sugar is an extreme example of such a product, its raw sugar cost being approximately 80 per cent. of the selling price of the refined (R. 938).

Because of this unusually high ratio between the cost of raw and refined sugar, the accumulation by the refiners of large stocks of raw sugar, or refined sugar, to meet their requirements for any extended period of time would involve

---

(1913) at pp. 99-102. We quote the following brief extract from that description:—

> "It is next in order to examine the relation between the prices of finished products and the raw materials from which they are made, whether the products are bought chiefly by families or by business enterprises. The available material offers twenty pairs of materials and their products, and five triplets of materials, partially manufactured, and finished goods. Table 5 gives the averages of both sets of data by years for 1890-1910, and by months since 1907.
>
> * * * * *
>
> "The table shows that, whether the comparison be by months or years, the prices of raw materials respond more promptly and in larger measure to changes in business conditions than do the prices of their products. Since the five partly manufactured products pursue a course intermediate between their raw materials and finished goods, it seems that the more manufacturing costs have been bestowed upon materials the steadier do their prices become."

F. C. Mills, Professor of Economics and Statistics in Columbia University, discusses this same principle in his book entitled "Statistical Methods" (New York, Henry Holt) on pp. 227-228. We quote the following therefrom:—

> "Business forces pure and simple play in the raw material markets with more freedom than in the markets for manufactured goods. Hence the tendency of prices in these markets to anticipate, in their movements, prices in other commodity markets."

See also p. 167 of "Economic Principles and Problems", by Sparr and others.

a tremendous element of risk. The price of raw sugar fluctuates very rapidly and widely and there is constant threat of a disastrous decline in the raw price, which is fixed in the world market (R. 589, 592). In purchasing raw sugar, the refiners receive no guarantee against a price decline (R. 714). For these reasons, the refiners watch the raw market very closely, estimate their immediate requirements as carefully as possible, buying generally from hand to mouth, and purchasing raws from day to day whenever the raw price seems favorable (R. 366, 369, 371, 373, 672, 674-8, 694, 713, 938).

They are therefore not in the relatively favorable position of most processing industries, where the raw price swings are not so violent and unpredictable, where storage facilities permit the accumulation of relatively large stocks, and where the manufacturers can and generally do accumulate large stocks of raw materials in periods of rising prices. These other processors are thus able to build up some defense against raw material advances, which helps to reduce the otherwise unfavorable effect of the relative inertia of finished goods prices, and when they are fortunate they can sometimes make enough of an inventory profit in a rising raw market to offset their lowered day-to-day price margins.

Comparative Effects Where Raw Price Trends Are Reversed. The comparative effect of this interval in the action and reaction times of the price of a raw material and its finished product is naturally intensified in a period when there is a rapid and wide reversal in the general levels of the price of the raw material. A year or other considerable period in which the price paid by processors for their raw materials is much higher than in the year before will usually

greatly reduce the processor's profits, perhaps wiping them out altogether and imposing a heavy net loss for the period. A succeeding period in which the raw material prices are considerably lower will usually show a large expansion in his margin and profits. His normal margin and rate of earnings cannot be judged by the results in either one of such years, and certainly a comparison of his margin and profits in two such years would not produce a true picture of normal results.

If it happened that he changed managers in the interval between two such years, he could not reasonably charge the retiring manager with the losses due to the higher raw material prices in his last year, nor could he reasonably credit the new manager with the profits due to the lower raw material prices in his first year. If he wanted to make a fair comparison between the actual business results achieved by the two managers, he would go back a year or two and forward a year or two and compare results in years that were really representative and comparable, with no freak conditions to distort the comparison. In comparing the net earnings under the two administrations, he would, of course, leave out the old manager's last year and the new manager's first year, unless he found years of similar raw material price level reversals in each of the two periods; and he probably would leave out the new manager's first year anyway on the ground that it would not be fair to judge his earnings results until after he had had time to get acquainted with his new surroundings, settle into his job and show what he could really do.

Now let us examine the method employed by the Government and accepted by the Trial Court in judging the comparative price trends and results of the Sugar Institute and its predecessor, Secret Concession System.

The Unjustifiable Device Employed to Make the Institute Margin Appear Higher than the pre-Institute Margin.

The only way it can be made to appear that the Institute is responsible for any increase at all in the margin, even the small increase of less than 5% pointed out above (pp. 89-90, *supra*) over the pre-Institute margin, is by the unjustifiable inclusion of the freak low year 1927 and the freak high year 1928 in the yearly margins used for the comparison. The reason they were freak years will be readily understood in the light of the discussion above.

In a year when a preceding downward trend of raw material prices is succeeded by a much higher average price, processors' margins, failing to follow the reversal promptly, are unduly reduced. In sugar refining, that was the case in 1927. In a year when a preceding upward trend in annual average raw prices is succeeded by a much lower price, processors' margins are unduly increased. That was the case in sugar refining in 1928.

The effect of this double reversal in the trend of raw prices in the years '27 and '28 is clearly shown on the graph on page 1 of the Appendix. Referring to that graph, it will be noted that the trend of average annual raw prices had been downward in '25 and '26. It had been downward also in all the preceding years starting with '24, as shown in Exhibit 8, page 24. *1927 was the only year in the series starting with '24 and ending with '31 when the average price of raw was materially higher than in the preceding year.* In that year the price of raw, instead of continuing its previous downward trend, thrust abruptly and strongly upward, and the average price of refined, due both to the usual lag and to the exaggeration of its effect in years of reversal in trend, failed to respond fully to the upthrust in the

price of raw, and it was therefore a year in which the refining industry as a whole lost money (Ex. E-17), with the lowest refiners' margin in more than ten years.*

Referring again to the graph we see that in '28 the average annual raw price fell, as compared with '27, thus reversing the trend from '26 to '27, and resuming the general downward trend for the series of years. Here again the refined price lagged behind the reversal in trend and the year '28 was in consequence a very profitable year.

By including the freak low margin of 1927 in its pre-Institute period of three years and the freak high margin of 1928 in its Institute period of three years, chosen by its counsel for this comparison, the Government thus gets a doubly unjustifiable result in the comparison, and on that basis asserts that there was an actual increase in margins in the Institute period as compared with the pre-Institute period, *and that this increase was due to the Institute's operations.* In fact, the increase was mainly due to the 1927 and 1928 opposite reversals in relative raw price levels.

Referring again to the graph on page 1 of the Appendix, or to the figures therefrom reflected in the table on page 96 below, it will be noted that in the two really comparable periods before the Institute and during the Institute, '25 to '26 and '29 to '30, *the average refiners' margin was exactly the same,* being 1.013.

These two periods are fairly comparable because they were both periods of a comparatively uniform downward trend in the prices paid for raw, with no reversal of that

*This same reversal in the long time trend of raw prices had happened on two previous occasions in the sugar industry, 1920 and 1923, average raw prices thrusting suddenly upward in each of those years and producing the sugar panic of 1920, and heavy losses to the refiners in both those years.

trend to disrupt the margin, and they are fairly comparable periods as to prosperity in the food processing industries since it is well known that the depression did not hit the food processors generally until considerably later than 1930. The drop in the prices they paid for their raw materials, coupled with the fact that the demand for their products did not fall off until later in the depression, held up the general margins and profits of food processors until well after 1930. We are all familiar with the statistical and securities publications which listed food processing as among the so-called "depression proof" industries. And specifically as to sugar, Exhibit M-15 shows that refined sugar sales in 1930 were nearly as large as in 1929 and were considerably larger than in 1928.*

For the Court's convenience in making these comparisons, we set out here a table, the figures for which are taken from the graph on page 1 of the Appendix, showing for each of the years from 1925 to 1931 the actual average price for raws paid by the refiners, the actual average price received by the refiners for refined, and the actual average gross margin realized.

	Actual Average Price paid by Refiners for Raws	Actual Average Price Received by Refiners for Refined	Actual Average Gross Margin		
1925.....	4.431	5.414	Average	.983	
1926.....	4.263	5.306	1.013	1.043	Average
1927.....	4.778	5.682		.904	.977
1928.....	4.278	5.397		1.119	
1929.....	3.784	4.798	Average	1.014	Average
1930.....	3.447	4.459	1.013	1.012	1.048
1931.....	3.367	4.303		.936	

Referring to the foregoing table, it will be seen, not only that the average margins for the two really comparable

*97,792,795 bags in 1928; 101,786,319 in 1929; 99,236,248 in 1930.

periods before and during the Institute ('25-'26 and '29-'30) were exactly the same, but that, after the year 1928, *when the open competition plan of the Institute got into full swing,* the price of refined each year dropped *more rapidly* than the price of raw, with a corresponding reduction in the actual margin of the refiners each year during the period of the Institute's operations after '28. Commencing with the year '28 and ending with the year '30 (to use the period the Government chose for its comparisons), the actual average annual price of raw dropped .831, whereas the actual average annual price of refined dropped .938, refined dropping .107¢ per pound more than raw. Commencing with '28 and ending with '31, raw dropped only .911, whereas refined dropped 1.094, the price of refined thus dropping .183¢ more than raw during the Institute period, the *actual* margin thus having decreased nearly one-fifth of a cent per pound.

We have here a graphic proof of the unusual strength of competition among the defendants during the Institute period. Commencing with the high margin of 1928, produced by that year's reversal in the raw price trend, the open competition fostered by the Institute drove refiners' margins down much faster than the decline in the price of raw, thus more than offsetting the natural counter-tendency of processors' margins to increase in periods of decline in the price of their raw materials.

In contrast with this, in the only comparable portion of the three-year pre-Institute period, '25 and '26, when there was a decrease in annual average actual price of raw, the price of refined did not drop as rapidly as the price of raw. Refined dropped only .108, while raw dropped .168, thus widening the margin by .06 in that period of declining raws.

Further Reasons Which Destroy the Finding That the Institute Tended to Raise Prices.

The unjustifiable inclusion of the freak years '27 and '28 in the comparisons of margins and profits of the pre-Institute and Institute periods is the sole foundation of the Government's charge and the Court's Finding that there was an increase in margins or profits due to the Institute's activities, or a *tendency* to higher prices. But even if it were to be *conceded* that the inclusion of these two years furnishes a proper basis of comparison, the result does not support the Government's charge or the Court's Finding. Using the Government's periods for the comparison, the margin for the pre-Institute period '25 to '27 averaged .977 cents, and for the Institute period '28 to '30 it averaged 1.048, an increase of .071, or one-fourteenth of a cent per pound, too small to have been reflected at all in consumers' prices, which are not based on such fractions. This increase is so relatively minute that it provides no foundation at all for the charge that the defendants planned and consummated a conspiracy to suppress competition and raise prices. Successful conspirators are not so self-restrained. The defendants composing the Institute included *all* the sugar refiners in the United States, and if they had been engaged in a conspiracy to restrain competition and raise prices, they certainly would not have contented themselves with a paltry increase of less than one-thirteenth of a cent per pound in their margin. When stated in terms of percentage of the pre-Institute margin this increase amounts to approximately seven per cent.

And there is another obvious reason which destroys the Court's Finding. Even the slight increase of .071 of a cent per pound in the margin for the Institute period over the

pre-Institute period is arrived at only by including in the comparison the margin increase of .215 (more than one-fifth of a cent) for 1928 (the first year of the Institute) over the unprecedentedly low margin of 1927. If it be assumed that this *entire* increase in 1928 was due to the organization of the Institute, instead of being largely due to the opposite reversals in the relative raw price levels in '27 and '28, it is clearly reasonable to say that the true effects of the new system of open competition fostered by the Institute cannot properly be judged by the results in the very first year after the abandonment of the old system of secret concessions. Having become accustomed to a method of competition which consisted mainly of fighting for individual customers by giving them a host of secret and crooked concessions, it naturally would take the refiners some little time to become accustomed to carrying on their competition in the full light of day and fighting for the orders of the whole mass of customers by giving straight-out reductions in price and advantages in terms to all.

The high margin of '28 may to some extent reflect such lack of adjustment to the new open competition. The tendency would be so natural and obvious that it is impossible to say that it did not exist. But if it did exist, the facts prove that it was purely temporary. It was due to the circumstances of the change from the old secret concession system to the new open competition and was confined to the first year of that change. That it was not in any sense due to any tendency of the new open competition to hold up prices or margins is conclusively proved by the fact that, when the new competition had settled into its full stride, in the period from '29 to '31, it drove the refiners' margin down much more rapidly than the decline in raw prices, so that both gross margin and net profits became

approximately the same as for the comparable pre-Institute period. The average margin was exactly the same for '29 and '30 as for '25 and '26, as we have seen (p. 95, *supra*), and when '31 is added the average margin for the Institute period is lower than for the pre-Institute period.

Refiners' Profits During the Institute Period and Before.

When the truly comparable periods of '25 to '26 and '29 to '30 are used, refiners' net profits, like their gross margins, are seen to have been approximately the same in the Institute period as before.

In this connection we refer the Court to defendants' Exhibit E-17. That Exhibit was compiled by a competent firm of certified public accountants from information obtained by them in an elaborate examination of the earnings records of the defendant refiners (based on the capital actually employed in refining) for the years '25 to '31 inclusive. It represents an exhaustive effort to present the most accurate investment and earnings figures possible and it stands substantially undisputed in the Record.

In order that the Court may have conveniently before it the figures for all possible comparisons, we set out below a summarized computation made from the elaborate tables of earnings figures in Exhibit E-17:

Year	Profit or Loss *before* charging depreciation, income and other corporate taxes		Profit or Loss *after* charging depreciation, income and other corporate taxes	
	%		%	
1925	4.20	Average	Average 2.22	Average
1926	Average 9.07	6.63%	4.13% 6.04	2.72%
1927	5.07% 1.94		-.09	
1928	8.44		5.90	
1929	Average 7.83	Average	Average 5.60	Average
1930	7.54% 6.34	7.08%	4.93% 4.26	5.25%
1931	6.02		4.02	

The reason for the disparity between the comparative averages before and after depreciation and taxes is due to the *relatively* large (though actually smaller than usual) charge for depreciation and taxes taken by the refiners in 1927, the year of positive loss.

The Result of the Above Figures.

The net earnings before depreciation and taxes are obviously the proper figures to use for *comparison* of earnings results between any two periods, because they are not distorted by the arbitrary changes from year to year in the amount of depreciation written into the earnings figures.

And for the reasons stated on pages 94-100 above, it is clearly improper and unfair to include in the comparison the earnings for either 1927 or 1928. In addition to the fact that each of these was a freak year because of the opposite reversals in relative raw price levels, which is the major factor in refiners' margins, and in addition to the fact that 1928 was the first year of the Institute's operation, when the refiners had not yet settled into their stride in the straightforward and open type of competition which had succeeded the old secret concession system, there is the obvious fact that 1927 should not be included *because it was the only year of net loss to the entire industry since the sugar panic of 1920-21.* When the Institute period used for comparison is only two or three years, it certainly distorts the comparison to include in the pre-Institute period of three years the only year of net loss to the industry in ten years.

Obviously something highly abnormal was at work in the sugar industry in 1927. On the very face of the figures, 1927 was not fairly representative of the results of pre-Institute conditions. Surely it cannot be the Government's contention that a net loss to the refiners is the *normal* result

of fair economic competition. Such a contention would be highly unreasonable, especially where the facts show that, in the years preceding the year of net loss, when the *same* type of competition prevailed, the refiners made substantially the same profits that they made in the years when the *new* type of competition was operating.

We submit that a fair and truly representative comparison of the net profit results under pre-Institute and Institute competitive conditions is obtained by using the figures for the years 1925 and '26, and those for 1929 and '30, each of them being a period with the same general downward trend in average raw price levels, and being fairly comparable periods as to general prosperity and prosperity in the food processing industries (see pp. 94-7, *supra*).

As the table shows, the average net earnings of the refiners in the two periods, before depreciation and taxes, were 6.63% in 1925-26 and 7.08% in 1929-30. Referring to Exhibit E-17, it will be seen that this increase of less than ½ of 1% in the rate of net earnings of the refiners during the Institute period over the pre-Institute period represented an actual increase in average dollar earnings of $3,135,706 per annum. But a large part of this increase is due to the increase in the capital invested in refining in the later period over the earlier period. The gross amount of that increase of capital investment was $29,268,771 (Ex. E-17). The net amount of the increase in capital investment, after deducting the arbitrary annual charges for depreciation taken for tax purposes, was $10,778,593 (Ex. E-17). The record contains no data from which may be determined how much of this annual depreciation charge was true capital asset depreciation, and how much was due to the usual and officially recognized practice of corporations in charging a maximum and somewhat artificial de-

preciation for tax purposes. Making the assumption most unfavorable to the defendants for the present comparison and treating the full amount of depreciation charged as true depreciation, the increase in earnings during the later period due to the net increase in investment was $714,620 (6.63% of $10,778,593), leaving $2,421,086 as the average annual increased earnings in the Institute period referable to causes other than increased capital investment.

Again making the assumption most unfavorable to defendants, by disregarding all other possible trade and general economic reasons for the increase, and assuming that the foregoing increase of $2,421,086 in actual annual dollar earnings during the Institute period was solely chargeable to the new open type of competition, the increase would amount to approximately $^{24}/_{1000}$ of a cent per pound of sugar sold by the refiners in the Institute period (see footnote on page 96, *supra*). Obviously, such an increase could not be reflected in the retail price of sugar. If, therefore, it be assumed, contrary to the facts as above presented, that this entire increase was due to the new type of competition eliminating secret rebates, it is also a reasonable inference that the increase represented the retention by the refiners of the profits formerly realized by the concessionaires out of their discriminatory rebates, and that none of the increase was reflected in any increased price paid by the consumers.

No Basis Stated by the Trial Court for the Finding that Margins or Profits Increased Under the Institute.

Unfortunately the Trial Court does not state anywhere in the Opinion or Findings the basis for the Finding that prices, margins and profits increased during the Institute period. The only references to the alleged increase are

those quoted from Findings 202 and 203, on page 87, *supra,* and the corresponding statements in the Opinion on pages 223 and 224 of the Record. These are mere assertions that there was some increase, with no statement of the alleged amount, or of the evidence upon which the assertions are based, or of the process of reasoning by which the Court reached that conclusion. Since this alleged increase is the sole factual basis upon which the Court could rest his fundamentally decisive conclusion that the activities of the defendants had *actually resulted* in any suppression of economically effective competition, we submit that his failure to state either the extent of any such alleged increase, or any facts or evidence upon which the Finding of such an increase was based, or the reasons which led him to the conclusion, leaves his decision of this underlying and controlling issue without any proper support in the record.

Subsidiary Argument of the Court on this Point. While the Court did not attempt to state any basis for his conclusion that prices, margins and profits were higher during the Institute period than before, he did advance one subsidiary consideration as indirect support for the conclusion. He said that "the number of price changes for refined as compared to raw has been relatively less since the Institute than before", and "expert buyers * * * found a lack of sensitivity in refined to raw prices in the post-Institute period" (Finding 202, R. 311).

But, as the Court himself stated in this same Finding, there had been a *pre*-Institute tendency in this same direction, and his point was merely that there had been an *acceleration* of that pre-Institute tendency after the organization of the Institute. He then *assumes* that the acceleration was the result of Institute conditions, whereas, if he had fol-

lowed through in his argument, he would have found that the acceleration was explained by two factors—(a) the lower average price of raw during the Institute period (3.83 in '28 to '30, as against 4.48 in '25 to '27 (see p. 1, Appendix); and (b) the narrower annual range from the high to the low price of raw during the Institute period (.76 in '28 to '30, as against 1.04 in '25 to '27; see Willett & Gray raw price tables in Exs. 21 to 26).

Obviously, the effective "'pulling" power of raw price changes upon refined prices will be less when raw prices are lower and therefore do not constitute *so large a percentage* of the price of refined. And just as obviously, changes in the raw price will have less effect upon refined prices when the *total annual range* of those changes is smaller. When this range is narrow, the up and down fluctuations tend to cancel each other and therefore lose their effect upon the price of refined. If the average of the price trend during the year were level, small fluctuations above and below that level, no matter how numerous they were, would not produce *any change at all* in the price of refined, but that would be no evidence that the price of refined was not "sensitive" to the price of raw. And the nearer the annual price range of raw comes to being level, the fewer will be the number of changes in the price of refined as compared with the number of changes in the price of raw.

As the above figures show, both these conditions were present during the Institute period, and we submit that it would be a mere *guess* for the Court to say that they do not fully account for the relatively fewer number of changes in refined prices during the Institute period.

Finally, it is clear that the decisive factor in this connection is not the relative *number* of price changes during the Institute and pre-Institute periods, but the *relative size*

of the margins. For truly comparable periods, as we have seen (p. 96, *supra*), they were exactly the same as before the Institute.

Conclusion from Comparison of Pre-Institute and Institute Prices, Margins and Profits.

We submit that the only reasonable conclusion that can be drawn from a fair comparison, in representative periods, of prices, margins and profits in the pre-Institute period and the Institute period, is that the activities of the defendants did not suppress or restrain effective competition and had no tendency to do so.

What the figures show is that the effective force of competition during the Institute period was substantially the same as before the Institute. With every refiner fighting in the open for his share of sugar sales, with honest public offers of low prices and non-discriminatory terms to the entire trade, the gross margin was held to exactly the same figures as in the pre-Institute period (p. 95, *supra*), and the net profits were but little more.

If it be assumed that the entire increase of less than ½ of 1% in net earnings during the Institute period was due to the substitution of open competition for the evil, discriminatory, and uneconomic competition of the secret concession system, the price was not too high a one to pay, and the fact of such an increase would not support the Trial Court's Decree. The meagerness of the alleged increase is conclusive proof that there was no such conspiracy as the Government charges and the Court found. It is simply not conceivable that these defendants, constituting all the sugar refiners in the United States, would have been content with an increase of less than ½ of 1% in their profits, if they had been operating such a conspiracy to suppress competition.

III.

THE NATURE AND EFFECTS OF THE VARIOUS STEPS TAKEN BY THE DEFENDANTS TO MAKE THE OPERATION OF THE BASIC AGREEMENT EFFECTIVE.

A. QUANTITY DISCOUNTS.

Section 2 of the Code of Ethics reads as follows (R. 261):

> "2. The business of the sugar refining industry is that of refining a raw product, the price of which to the industry is the controlling factor in the price which the industry receives for its own refined product; and the industry as a purchaser of raw sugar receives no concessions for quantity purchased. Concessions made by the industry for the quantity of refined sugar purchased have resulted in discrimination between customers, which discrimination the Institute believes it to be in the interest of the industry, of the trade and of the public to avoid. The Institute accordingly condemns as discriminatory, and in so far as this industry is concerned, as unbusinesslike, uneconomic and unsound, concessions made to purchasers on the basis of quantity purchased."

The "quantity" discounts against which the condemnation of Section 2 of the Code of Ethics was directed were the sporadic and arbitrary concessions and allowances which large buyers were often able to exact under the guise of quantity discounts. Since only this type of pseudo quantity discount existed in the industry, it was only such discounts, and not true quantity discounts, which were abandoned by the refiners after the formation of the Institute.

Concerning these pseudo quantity discounts given before the Institute was organized, the Trial Court found as follows:

> "156. Prior to the Institute there was no systematic practice of giving quantity or other discounts. The majority of discounts were given to the large buyer. But discounts were often granted to the smaller buyer as well, and the amount of the discount bore little relation to the amount of the purchases or the method of taking delivery. This was the natural result of the pre-Institute secret concession system. The 'ethical' refiners, except in the case of the Revere long term contract, apparently gave nothing which might be deemed a special discount" (Finding 156, R. 301).

Although the so-called quantity discounts given before the Institute were not graded according to the quantity purchased, the condemnation of quantity discounts in the Code is broad enough to include quantity discounts so graded. It is the contention of defendants that this broad condemnation is reasonable and justifiable in the sugar refining industry because, under the special facts of that industry, sales to large purchasers do not involve any saving to the refiner in either direct or indirect costs substantial enough to be translated into a discount. A discount to large buyers which does not thus represent a saving due to the size of the purchase is obviously a purely arbitrary price discrimination.

The Code provision with respect to quantity discounts was drafted in its present form as a result of the refiners' conferences with the Attorney General's staff. The Attorney General's staff took the position that a quantity dis-

count ought to have some definite relation to the saving made by the manufacturers as a result of the quantity purchased (R. 617). As testified by Cummings, after reviewing the peculiar circumstances in the sugar refining industry,

> "The Attorney General's staff took the position that a quantity discount was an unjust, unfair discriminatory practice and said they would accept our Code with a provision not to give quantity discounts. That is why the provision went in that way. It was entirely redrafted down there and the reasons for the elimination of quantity discounts were put in. It did not occur in the original form and this statement that no economies were to be derived by the industry by reason of quantity purchases was inserted" (R. 618).

The evidence in the record amply demonstrates that sales of refined sugar to purchasers who buy in large quantities do not bring about any, except possibly the most minute and infinitesimal, reduction in costs to the refiner. They neither bring about a saving in *direct* costs nor do they reduce unit costs by effecting a saving in overhead or *indirect* costs.

No Saving in Direct Costs.

Under the practices prevailing in the sugar refining industry, sales in large quantity units and sales to purchasers who buy a relatively large quantity of sugar during the year effect no saving to the refiner in *direct,* as distinguished from overhead, costs. The validity of this contention is completely substantiated by the specific Findings of the Trial Court:

"(a) The refiners get no discount for quantity purchases of raws which constitute about 80% of the cost of refined.

(b) Quantity sales effect no appreciable direct savings in manufacturing costs.

(c) Quantity sales effect no savings in brokerage" (Finding 160, R. 302).

The Court likewise made the specific Finding that no savings in "delivery, storage, bookkeeping, and other incidental expenses" would be effected in large sales to chain stores "because the large sales in such cases usually amount, in effect, in view of the method of taking delivery, to a series of small sales to the individual stores in the chain" (Finding 160, R. 302).

The only savings found by the Trial Court were stated to be as follows:—" * * * in sales to those manufacturers and distributors that can take deliveries of their sugar in carload lots direct from the refinery, as many prefer instead of ex-consignment, there are substantial savings in delivery, storage, bookkeeping, and other incidental expenses", and "large purchasers other than chain stores were more likely to take deliveries in this way than small purchasers" (Finding 160, R. 302). Even if it be assumed that the savings found by the Court were actually effected, they would obviously result solely from the buyer's *method of taking delivery,* and regardless of whether the carload delivery from the refinery was taken by a small or large buyer. Clearly, any such savings would neither represent a reduction in direct costs due to the *quantity purchased* nor afford any justification whatsoever for a "quantity" discount.

Reference to the Opinion discloses that this Finding of the Court is based solely upon the testimony of Lowry, President of the National Biscuit Co., and that the Finding reflects a complete misconception of the effect of that testimony. Lowry testified that

> "Expenses of a refiner in handling sugar in consignment warehouses consist of storage, insurance, labor in and out and damaged sugars" (R. 380). "* * * The practice of National Biscuit, as well as Coca-Cola and Wrigley in purchasing carload lots, eliminated warehouse storage, insurance and labor costs, and the risk of the sugar becoming damaged. *There is no distinction between purchases and deliveries to our small plants and purchases and deliveries to the wholesaler who buys sugar in carload lots and has it shipped directly from the refinery and stores it in his own premises. The cost to the refiner is the same*" (R. 385).

National Biscuit always took deliveries at its various plants in at least carload lots, but as Lowry testified: *"Any small wholesaler might take as much as a carload lot in the same communities where these small plants were located"* (R. 385).

It should be noted that even the small wholesalers practically always bought in carload lots when they shipped direct from the refinery. And where they did not individually want full cars they shipped "pool" cars with their neighbors. This shipment in carload lots was in no sense related to the matter of quantity discounts. No one in the industry ever even *thought* of a carload purchase as a *quantity* purchase. A carload was the standard minimum unit and rail shipments of less than a carload were rare.

The refiners made no difference in price per bag to the purchaser of a carload and less than a carload, because there was, in fact, no material difference *to the refiner* in the cost *per bag* of sale and delivery by carload as against less than carload. The testimony on that point is unanimous, that any difference in cost to the refiner between these two types of shipments would be minute (R. 942-3, 966, 973). Differences in rail freight costs, directly reflected to the consumer in the freight application, are of course not referable to any alleged quantity or other discount. The purchasers who shipped in carload lots have always received the benefit of that method of shipment through the consequent reduction in their rail freight bills.

Lowry's testimony goes no further than to support the testimony of defendants with respect to the expense involved in the maintenance of stocks at consignment points throughout the country. He did not attempt to compare the cost to the refiners of deliveries in carload lots with the cost of deliveries in less than carload lots.

No Saving in Indirect Costs.

Clearly, quantity sales do not result in any savings in *direct* costs, justifying the granting of quantity discounts. The sole remaining question is whether large-quantity sales or sales to large purchasers are, or can be, responsible in the sugar refining industry for any saving in unit costs through a relative decrease in *overhead* or *indirect costs*. They might be held to be so responsible if, for example, they brought about greater *evenness of distribution* of production through the year, filling up the valleys and leveling the

peaks of production. However, it is unnecessary to review the conclusive evidence that they did not accomplish this result in view of the Finding of the Trial Court that

> "As to greater evenness of production, defendants correctly say that the volume of sales in large quantities substantially follows the same peaks and valleys throughout the year as does that in smaller quantities" (R. 182).

While the Court found that particular long term contracts offered by several refiners to certain customers prior to the formation of the Institute, which contemplated delivery of fixed quantities of sugar over an extended period, effected savings for the refiners, those savings resulted from the manner in which delivery was taken rather than from the quantity involved in the purchase. Section II of the Code of Ethics limits its condemnation to quantity discounts as such, *i.e.*, to discounts given for quantity purchased, and does not condemn discounts for even deliveries of fixed quantities of sugar at regular intervals, or for deliveries at seller's option, or for any type of deliveries which might involve a real saving to the refiner (R. 944, 967, 973).

Not only is it true, as found by the Court, that large orders in the sugar refining industry do not result in decreasing unit costs through *distributing* production more evenly through the year, but it is also true that large orders are not responsible for any saving in indirect costs through *increasing* production volume. It is, of course, true in the sugar refining industry, as in many other industries, that the total volume of the "run" is an element in the unit cost of refining and that costs diminish to some extent in proportion to an increase in the quantity of output. However,

it does not follow that, because large quantity purchases swell the total volume of production, and this *total* production results in decreased costs, the benefits resulting from the decreased costs should be passed on to the large purchasers.

If it could be said that the large orders received by a refiner were bag for bag more responsible for the size of his total production volume than the large number of small orders which also contribute to that volume, then it would follow that the decrease in costs due to the increase in volume would be exclusively caused by the large orders, and the large purchasers would therefore be entitled to a special benefit from the decreased costs in the form of a lower price per bag, without giving any grounds to the small purchasers for complaint that they were being unfairly discriminated against. If, in other words, the saving in cost would not be accomplished at all unless some of the orders were large—that is to say, if the total volume of production could not be increased without large quantity orders, the large purchasers would then be fairly entitled to a lower price than the small purchasers.

In short, if it can be said that a large number of small orders could not be obtained which would build production volume up to the point where costs would be reduced, but that only by getting large orders can this be done, then the saving in costs could be fairly attributed to the large orders alone and the small purchasers would have no right to share in the savings from reduced costs. On the other hand, if it is possible to build up total volume of production and sales by getting an increased number of small orders as well as by getting a few large orders, then the small purchasers are just as much entitled to share in any savings

from an increase in the volume of production as the large purchasers would be who also contributed to some increase in production.

It is this latter condition and not the former which prevails in the sugar industry. A large purchaser who takes 50,000 or 100,000 bags of sugar during a year contributes no more to the production volume of the refiner to whom he throws that business than would be contributed by 50 or 100 customers who took 1,000 bags apiece during the year. The reason why this is so in the sugar industry can be illustrated by comparing the sugar refining industry with an industry which puts out a luxury specialty or a proprietary mechanical device.

In the case of such specialties and proprietary articles, the producer can frequently create an entirely new demand for additional quantities of his article that otherwise would not be consumed at all, by giving a special discount for large purchases. He may thus reach a new section or level of the consuming public by materially reducing the price to them. By enlisting the active sales efforts of the distributors whose quantity discounts enable them to reduce the price and thus reach consumers who would not otherwise purchase the article, the manufacturer may be enabled to equip his factory with machinery for mass production to supplant high cost hand labor and thus reduce his costs sufficiently to permit a further reduction in his selling price.

The quantity discount, operating through the encouragement of large orders, is, in such cases, in and of itself the very thing which causes the article to be used in larger quantities and thereby makes possible an increased volume of production and a saving in unit costs of production.

Nothing like this is true in the case of a uniform standardized article of necessity like refined sugar, the total de-

mand for which cannot be substantially increased by special concessions or discounts, quantity or otherwise. By encouraging wholesale purchasers to buy sugar in large quantities rather than small quantities, the refiner does not increase the total public consumption of sugar. He cannot, like the producer of a luxury or specialty article, create new sales outlets for his product by selling the product at a lower price to large distributors. He is simply promoting the distribution of what amounts to a limited annual volume of consumption through large distributors rather than through small distributors, and without being able to bring about any increase in consumption, and therefore of production, which would warrant such discrimination through lowered production costs (R. 617, 940, 967, 1134, 1163-4).

The Trial Court's Attempted Justification of Quantity Discounts in Certain Cases.

The Trial Court's attempt to justify quantity discounts for sugar in certain special situations on the theory that they reduce indirect costs is based upon the following chain of reasoning:

> (1) "The demand for sugar is elastic" (Finding 161, R. 303).
>
> (2) "Encouragement of large sales through quantity discounts *may reasonably be expected to tend* in the long run to build up total production and thereby effect economies for the refiners" (Finding 161, R. 303).
>
> (3) "A quantity discount to those wholesalers selling to manufacturers as well as to manufacturers buying directly from the refiner, *may well result*

in a substantial increase in sugar consumption" (Finding 162, R. 303).

(4) Therefore, "at least in many cases a discount based solely on quantity would have been justified even under defendants' economic theory" (Finding 164, R. 303).

1. *"Elasticity."* The Court's Finding that the demand for sugar is elastic is correct only in a very qualified and limited sense. "Elasticity" is of course a purely relative term. The demand for sugar is "elastic" only in the sense that it fluctuates to a certain limited extent from year to year. For example, during the five-year period ending in 1929 the per capita consumption of sugar in this country fluctuated as follows (Ex. 19, p. 19):

1925.....	107.50 lbs.
1926.....	109.30 "
1927.....	100.95 "
1928.....	104.27 "
1929.....	108.13 "

As indicated by the figures above quoted, consumption dropped off to some extent in 1927. During that year, the peak of the concession era, as pointed out by the Trial Court, "certain distributors refrained from pushing the sales because they could not sell profitably" and "the public 'slimness campaign' of that year had substantial effect in discouraging the use of sugar" (Finding 25, R. 271). As testified by Cummings, "In 1928 the refiners undertook an advertising campaign in the newspapers for the purpose of overcoming this campaign" (R. 594) and, as pointed out by the Trial Court, "spent through the Institute about one and

three-quarters million dollars for advertising; they advertised ice-cream, cereals, and various other things with which sugar would be consumed". (Finding 163, R. 303). The refiners plainly recognized the fact that the demand for sugar is elastic in the sense that it is possible to combat the effects of slimness fads and the like and to encourage the consumption of sugar to a certain extent through intensive educational and advertising campaigns.

However, as shown by the undisputed evidence, the demand is not elastic in the sense that it depends upon price. It is utterly impossible to increase the total consumption of sugar in this country by the granting of quantity discounts, which, at their very largest, can represent only a minute fraction of a cent per pound. As testified by Cummings,

> "* * * The price at which refined sugar sells has little to do with the amount an individual consumes. It enters so minutely into the budget that you cannot persuade people to buy much more sugar. If the refiners gave away their entire margin it would not increase the consumption of refined sugar. This is illustrated by the fact that the price of sugar has declined about 40% in the last 2 years and still consumption has not increased. It has decreased steadily since 1929" (R. 593).

White, of American, testified:

> "The total quantity of sugar sold annually in the United States could not be increased materially if the special inducement were offered by the refiners to encourage purchases in large quantities unless some new industrial use was found for sugar and in that event a special discount, which reduced the price, might encourage the use of a greater quantity. If some new commercial use was found and

the use of sugar depended upon the price, a quantity discount might have the effect of increasing consumption in that particular direction" (R. 967).

Placé, of McCahan, testified:

> "In other industries, where there is a trademarked product which a manufacturer can push and give a discount to a large buyer, securing that large buyer's help in promoting the sale of this article and acquainting more consumers with the existence of the article so that they will come back and demand that trademarked specialty by name, a direct saving can be made in the manufacturing costs by giving these discounts and increasing the total amount. This is due to the fact that on these specialties the demand is elastic, but in the case of sugar the demand is inelastic. The distribution may vary from year to year but actual consumption does not vary so that discounts to large buyers would not result in increasing the total purchases of the sugar. Even if it did, we have no assurance the demand would be for our particular brand of sugar" (R. 940).

(See also the testimony of Dr. Seligman and Professor Adams to the same effect. R. 1139, 1163).

2. *Long Run Increase in Production.* The second point in the Court's argument on this question—that quantity discounts "may reasonably be expected to tend in the long run" to increase sales and total production—is nothing more than a cautiously qualified expression of opinion by the Trial Court rather than a definite Finding of Fact.

3. *Quantity Discounts to Manufacturers.* When the Court attempts to be specific in applying his generalized

speculation—that quantity discounts to manufacturers would "tend in the long run to build up total production and thereby to effect economies for the refiners"—his argument breaks down against the facts. He says:

> "* * * According to the testimony of one of their principal witnesses, one-third of all the sugar sold by defendants is bought for use in the making of other products * * *. As these may well have 'a market capable of indefinite expansion' a quantity discount to a manufacturer of such a product would enable him in turn to dispose of more of his product; increased demand for sugar would necessarily follow. Coca-Cola offers an example; from 1926 to 1929, its sugar purchases increased from 1,240,000 bags to 2,250,000 bags * * *, an increase equivalent to nearly 1% of all sugar consumed in the U. S. during 1929" (R. 183).

Coca-Cola. The statement that a quantity discount on sugar to manufacturers such as Coca-Cola would enable them to dispose of more of their product and that "increased demand for sugar would necessarily follow" is a speculative conclusion that is not supported by a shred of evidence. It is inconsistent with the testimony of every witness who testified on the subject, and it is so conclusively contradicted by facts known to everyone that it is impossible to understand how the Trial Court could have made such a statement.

It is a matter of common knowledge that the cost of Coca-Cola to the vast consuming public which supplies the demand has not varied a fraction of a cent despite the great decline in the price of refined sugar over the past decade, due to the decline in the cost of raw.

In the five years from 1927 to 1931 the price of refined sugar dropped nearly a cent and one-half per pound, averaging 5.68 cents in 1927 and 4.30 cents in 1931 (Ex. S-17, p. 1, Appendix hereto). Since 1931 it has dropped nearly half a cent more. And during all of this time the price of Coca-Cola has been 5 cents a glass everywhere! If a decline of nearly 2 cents a pound in the cost of sugar has not led the manufacturers to reduce the price of Coca-Cola, so as to increase its sales, where could the Court get the idea that a possible *quantity discount* on refined sugar might have brought about that result?

The refiners' entire margin, covering all their manufacturing and overhead costs and profit, throughout this period has averaged approximately one cent per pound of refined sugar (see p. 96, *supra*). The evidence shows that the maximum possible saving in manufacturing and other costs that could be realized by the refiners from giving quantity discounts would be from 1/50 to 1/100 of one cent per pound (R. 615, 943, 966-7, 973). But to provide an extreme theoretical example, let us assume a quantity discount to Coca-Cola of 1/10 of one cent per pound, which would equal approximately 1/10 of the refiners' gross margin. The Court's reasoning would require us to believe that although the drop of nearly two cents per pound since 1927 in the price of refined sugar due to the decline in raw has not induced Coca-Cola to reduce the price of Coca-Cola by a fraction of a cent, the additional saving of 1/10 of a cent per pound on sugar would have induced Coca-Cola to reduce its price to the public sufficiently to increase the consumption of Coca-Cola and thereby increase the sale of sugar by an amount large enough to justify the quantity discount. A glass of Coca-Cola contains approximately 3/100 of a pound of sugar. A quantity discount of

1/10 of a cent per pound would represent a reduction to Coca-Cola of 3/1000 of a cent in its cost for each glass of Coca-Cola. If *all* of that reduction were passed on to the consumer, it would take some considerable time before the "long run tendency to build up increased production" which the Court speculates about would manifest itself.

In fact, even if the refiners *gave* Coca-Cola *all of the sugar it consumes*, without any charge at all, the resulting reduction of approximately 15/100 of a cent in the cost to Coca-Cola per glass of its product could not conceivably be passed on to the consumer or to any class of distributors in any way which would increase the demand or the sales.

Candy. The Court's choice of Coca-Cola as an example to support his argument was unfortunate. But no other example he could have chosen would have given him any *real* support. Candy would have been his optimum example. Its sugar content is higher than that of any other manufactured product containing sugar as an ingredient. In physical content candy averages approximately 50% sugar. Sugar represents a substantial percentage of the average candy manufacturer's total costs, averaging about 15% of such costs.* Furthermore, candy is a luxury with an immense potential market, and therefore the demand for it has the maximum of elasticity, in the sense that it is most responsive to reductions in price. From these facts it follows that if any conceivable quantity discount on sugar could ever justify itself by producing an increase in consumption and demand sufficient to increase the refiner's total production of sugar and thus enable him to realize a saving

*These facts about candy are based on the "Biennial Census of Manufacturers for 1931", published by the Bureau of the Census, U. S. Dept. of Commerce.

in his manufacturing costs at least equal to the quantity discount which is supposed to rest upon such a saving, candy would be the ideal product with which to demonstrate the operation of this principle. Let us follow the maximum possible quantity discount on sugar through to the point in the sale of candy where such a discount must manifest itself in order to produce any increase in the consumption of candy.

As we have seen, the refiner's gross margin is less than one cent a pound, and that margin covers all his manufacturing costs, overhead and profits, and his maximum possible saving in costs through the giving of quantity discounts would be 1/50 to 1/100 of one cent per pound (R. 615, 943, 966-7, 973). But here again if we assume that he might make a saving of as much as 1/10 of a cent per pound (or 1/10 of his gross margin) by extending such discounts and thus increasing his production to the maximum, and if we assume that he gave that maximum discount to the candy manufacturer, and that the candy manufacturer passed all of that discount on to the wholesaler, and he in turn passed it on to the retailer, and he in turn to the consumer, and if candy had no other ingredient than sugar (instead of being, as it is, only about 50% sugar), the consumer would get his candy for 1/10 of a cent per pound less by reason of that quantity discount received by the manufacturer. It is common knowledge that the retail price of even the very cheapest candy is not less than 20 cents per pound, and from that the price runs up to a dollar or two per pound. Just how would the retailer go about it to induce his customers to buy more candy by giving them this reduction in price of 1/10 of a cent per pound, which,

according to the Court's theorizing, is supposed to increase the demand and thus to justify the quantity discount? And if the Court's reasoning cannot be supported by the facts as to candy, what other product can be imagined to support it?

Can Quantity Discounts Increase a Refiner's Production Enough to Reduce His Costs by an Amount Equal to the Discounts?

It is true, of course, that while the total amount of sugar demanded by the public and therefore capable of finding a market, fluctuates very little from year to year, still, as between the different refiners, one of them might theoretically be able, by giving quantity discounts, to increase his own production volume in any given year by taking business away from his competitors; and through getting this additional share of business he would be able to lower production costs.

But the offer of an *open* system of quantity discounts would not serve in this way to attract additional business to any refiner as long as other refiners offered the same terms. If one refiner publicly offered to sell sugar at a graded scale of quantity discounts, it is perfectly obvious that no other refiner could afford to stand back or would stand back and see his larger customers thus taken away from him, but on the contrary would himself offer the same discounts. The result would be to leave the business precisely as it stood before the discounts were given (R. 941).

If a large buyer of sugar could get the same discounts for his quantity orders from one refiner as from another,

there is no more reason for him to buy his sugar from one refiner as compared with another than there is where no discounts at all are offered. In consequence, the discounts if openly offered could in and of themselves have no effect in increasing the production volume of any refiner, and therefore cannot be said to represent the passing on of lower costs due to large-scale buying. They would simply be *bribes* to large buyers and would represent mere discriminations between large buyers and small buyers to the advantage of the former and to the disadvantage of the latter.

The whole theory of quantity discounts as leading to reduction in indirect costs through increase of volume and as therefore representing a passing on of this reduction to the purchasers who are specially responsible for it, breaks completely down in the case of refined sugar, though it is validly applicable to certain special products the total consumption of which can be materially increased through such reductions in price to the consumer as may be effected through quantity discounts to distributors. It is not applicable to the sugar refining industry because of the impossibility of creating new demand for sugar which would not exist apart from the quantity discounts.

It is obvious that in the case of a commodity like sugar, the only way in which a refiner could use a quantity discount to get business that he otherwise would not get would be by giving the discount *secretly*. If he offered the discount openly, all his competitors would inevitably offer it too. They would have to do so in order to retain their business, thus leaving all parties exactly where they stood before, as we have seen.

It is perfectly true that a refiner by offering a quantity discount would be able to attract large customers away from his competitors *if the latter did not know of the discount and were therefore unable to meet it.* This kind of secret quantity discount is the only kind of quantity discount that can exist in the sugar refining industry, because it is only these secret discounts which will really result in increasing the total production volume of a given refiner and therefore justify themselves to that one refiner by bringing about lower unit costs.

As surely as the door is opened to quantity discounts in the sugar refining industry, it is also opened to secret and irregular price concessions in favor of large customers, to the disadvantage of small customers. This is why quantity discounts are condemned in the Code of Ethics of the Institute. They are condemned because they are bound to be only a form of the secret price discriminations which the Institute was brought into existence to eliminate from the industry. If the trade is not permitted to eliminate quantity discounts, it is impossible to hope for the elimination of secret price discriminations which will put some purchasers of sugar, and particularly the smaller purchasers, at an unfair disadvantage in their competition with other purchasers, and particularly with the larger purchasers.

B. REGULATIONS AFFECTING BROKERS AND WAREHOUSEMEN.

The reasons justifying the adoption by the refiners of the basic principle that sugar should be sold only upon open prices and terms publicly announced, without discrimination among customers, has previously been considered. If

this principle were to be anything more than a pious aspiration, it was essential that definite and effective action be taken to eliminate those conditions which permitted violation and evasion thereof.

In dealing with brokers and warehousemen the question is not what the refiners did, because the facts are clear in the Record. The sole question to be determined is *whether the action taken was reasonable in the light of the conditions with which the industry was confronted.* If the basic principle condemning secret discriminations was lawful, as the Court found and this brief maintains, such steps as were reasonable and necessary to effectuate that principle were likewise lawful.

In considering the necessity and reasonableness of the broker and warehouse regulations it is essential to examine into the functions of the broker and the warehouseman in the sugar industry and to realize the extent to which their functioning was impaired and fraud practiced upon the refiners when a broker was permitted to merchandise or store sugar, or a jobber was permitted to play the part of warehouseman to the refiner. It must be borne in mind that the broker and the warehouseman are the agencies which the refiner employs and pays and upon which he relies and is dependent for the sale and distribution of his product. If the manner in which these agents deal with the refiner's sugar cannot be controlled by the refiner and compromise of the brokerage and warehouse functions avoided, the refiner not only loses control of the sale and distribution of his product but is exposed to all manner of imposition and fraud, and realization of the cardinal principle of the Code of Ethics is frustrated by the refiner's impotency in supervising his own agents (R. 596-7, 862-6, 871-2, 892-6, 899-903).

While the recommendations and rulings of the Institute were designed primarily to prevent fraudulent and discriminatory practices which the refiners would otherwise have been unable to prevent, another purpose thereof, as found by the Court, was to assure refiners, anxious to adhere completely to the principles of the Code, that competitors would not resort to some of the practices engaged in prior to the formation of the Institute (Finding 79, R. 284). In view of the vicious and cutthroat competitive conditions prevailing at the time of the formation of the Institute, it is no reflection upon the good faith of the refiners that they wanted some measure of assurance that, in adhering in good faith to the principles adopted, they would not be prejudiced by secret violation thereof on the part of any other refiner.

Code Provisions Affecting Brokers and Warehousemen.

Section 3 of the Code (R. 261-2) condemned

> "(d) Payment of brokerage where any part thereof enures to the benefit of the purchaser."
>
> "(e) Storage of sugar in warehouses in which customers or brokers are interested, or with which they are in any way affiliated."

Pursuant to and in furtherance of these resolutions, the members of the Institute adopted the policy of requiring that in the handling of their sugar the inconsistent and incompatible offices of broker and warehouseman be kept separate from each other and from the merchandising of sugar. This action was not taken, however, until May of 1929, nearly a year and a half after the organization of the Institute (R. 891). Until that time the Code provision

3(e) just quoted was a mere declaration of a sound principle, and the practical steps necessary to put it into effect had not been taken. Experience during this time had demonstrated that the refiners' attempt to abolish secret discriminations was being defeated by their own agents, the brokers and warehousemen, and that the most potent device in accomplishing that defeat was the combination of any two of the three functions—brokerage, warehousing and merchandising (R. 891-2, 894). The reasons necessitating and justifying this requirement of an election of functions, condemned by the Trial Court, are to be found in an analysis of the conditions prevailing before the adoption of the rule.

The Special Functions of the Broker and the Warehouseman in the Sugar Trade.

Refiners sell almost all of their sugar through brokers, and largely from consigned stocks kept in warehouses at terminal points to serve adjacent territory (Opinion, R. 111-2). The broker is the refiner's agent to sell the refiner's sugar to customers and is paid brokerage by the refiner for his services. The warehouseman is the refiner's agent for storing and delivering his sugar. In the operations of the sugar business these two agents act as a check on each other to make sure that each performs his functions (R. 894-5).

Delivery is made by the warehouse to the customer upon written orders of the broker, called delivery from consignment orders, or "D from C's", and the warehouseman sends triplicate delivery slips, showing the date of delivery, to the refiner, the broker and the customer (R. 862). On all sales except those by direct shipment from the refinery, the date of delivery of sugar from the warehouse to the customer starts credit and discount terms running (R. 862).

On all sales *between moves,* the date of delivery from the warehouse also determines the *price* at which the sugar is sold, as well as the date from which discount and credit terms start running (R. 862). By post-dating the delivery slips through the connivance of the broker and the warehouseman, or the warehouseman alone, the customer may be given the benefit of a drop in the market occurring after the sugar was delivered but before the date of delivery appearing on the delivery slip, and may also be given longer discount and credit terms. Similarly, by pre-dating the delivery slips, the customer may be given the benefit of the prior low price after a price advance (R. 863).

In the sugar trade, where the conventional distributors' margin is only 5 or 10 cents a bag, and where the price change between two days is often 20 or 30 cents a bag, this device of secret and dishonest discrimination between customers and of fraud upon the refiner by falsification of delivery dates is a very serious menace. The brokers and warehouseman are always under great temptation to use it. It is most important to the refiner, therefore, that the warehouseman send in accurate and honest delivery slips. The only check the refiner has on the warehouseman is through the broker upon whose order the sugar is delivered and one of whose functions is to select and supervise the warehouseman.

The refiner also relies upon the broker to perform the following additional functions in relation to warehouses: (a) to choose those warehouses which have the most advantageous location and the best storage facilities, and to secure the best storage rates available; (b) to notify him promptly and truthfully of the exact date on which sugar arrives at and is shipped from the warehouse, in order that

he may have an independent check on the storage charges; and (c) to report the fact and degree of damage occurring to sugar in a consignment warehouse in order to determine the price at which such damaged sugar should be offered for sale (R. 864-6).

The great importance of the special functions performed by the broker and the warehouseman, as between the refiner and his customers, and also by each of these two classes of agents as against the other, is readily apparent from the foregoing description. We will now discuss briefly the detailed application of the Institute regulations to each of these relationships.

Storage with Customers and Brokers.

From the foregoing description it will be seen that the refiners' concerted adoption of the principle against storing in customers' and brokers' warehouses was essential, not only to prevent discrimination among customers, but also to avoid the impositions and frauds upon the refiners which were practiced by customers and brokers with whom sugar was stored.

If the warehouseman is himself the purchaser of the sugar, the refiner is deprived of the independence and disinterestedness of the warehouseman and of his very function, and the purchaser has complete control of the sugar with the power of withdrawing it at his will and reporting the withdrawal at his pleasure, with every temptation and incentive to post-date or pre-date the report of the withdrawal.

The combination of these two functions therefore operated not only to defraud the refiners, but to defeat their attempt to abolish secret concessions. They could not even *pretend* that they were in earnest about abolishing secret concessions as long as they stored with customers and thus provided such customers with a perfect means of facilitating and practicing such concessions (R. 862, 863, 871, 894-5).

Similarly, storage with brokers greatly facilitates the granting of secret concessions and the perpetration of frauds upon the refiners, in all of the ways above enumerated and in many other ways as well. The warehouseman-customer is at least under *some* supervision from a broker, difficult as it may be to make that supervision effective. But where the warehouseman and the broker are the same, neither is under any supervision at all, except the occasional and necessarily ineffective visitations of some travelling representative of the distant refiner. Under such conditions the broker-warehouseman can do practically what he pleases with the refiner's property and business, and the refiner can do little either to protect himself against frauds or to protect his business and his customers against secret discriminatory practices.

It is unnecessary to review the abundance of testimony elicited from the witnesses, both for the Government and the defense, supporting the foregoing discussion of these facts, in view of the Trial Court's own statements on this subject. We quote from the Opinion as follows:

> "1. *A combination of distribution functions in a single concern facilitated the grant by a refiner of*

secret concessions, difficult of detection. Thus a customer whom a refiner wished to favor, might be paid what was called brokerage commissions although in fact no brokerage service was performed; or a refiner might place sugar with and pay so-called warehouse fees to a wholesale sugar merchant, although in fact the customer performed no real storage service but held the sugar on his own premises solely for his own use. A dummy warehouse corporation might even be set up in order the better to conceal the concession.

"This so-called storage as well as bona fide storage with a customer also enabled him to sell the sugar to his own trade or otherwise to use it without reporting to the refiner the time of withdrawal from consignment for the customer's own account; the customer might then await a drop in the market and report the withdrawal as of such later time, thus obtaining the benefit of the lower price. By delaying reports, he might also obtain an extension of credit terms. *Brokers who stored sugar might by a similar manipulation of reports, use fluctuations in the market to favor their own customer; they might also divert sugar directly to customers' premises and charge refiners for unearned storage.* * * *

"Other 'evils' which the Code rules sought to eliminate were the fraudulent practices of delaying withdrawal reports and charging unearned storage without refiners' consent. *Such practices were made possible largely by such a combination of activities, and, in fact, were often indulged in by those who combined two or more of the several businesses.*

"* * * Where distribution functions are combined, there clearly is opportunity for such double dealing, which some brokers and warehousemen may at times seize.

"* * * Defendants' brief virtually admits and the correspondence with one another and with brokers, warehousemen and jobbers shows that honest dealing by such distribution agencies was not uncommon, *indeed that it was perhaps about as usual as dishonesty*" (Italics ours) (R. 112-4).

In view of the Trial Court's own Finding that secret concessions are evil and uneconomic (R. 271), and of his own statements that any combination of the inconsistent functions of broker, warehouseman and merchandiser facilitated the perpetration of frauds and the granting of secret concessions, and made them difficult of detection, and that dishonesty was about as common as honesty where such functions were combined, it is impossible for us to see how the Court could logically arrive at the Finding and Conclusion that it was unlawful for the appellants to concertedly require that their agents, the brokers and the warehousemen, should not combine any two of these three inconsistent functions.

Certainly nothing is disclosed by the record here which could justify the Court's failure to apply what seems to be the inevitable logic of his own statement of the facts, as quoted above from his Opinion. On the contrary, the evidence provides ample support, beyond that already discussed, for a policy of acting concertedly to abolish the evils inherent in the combination of such inconsistent functions.

The Practice Before the Institute. The refiners had always been reluctant to store with brokers or customers. Many of them never followed the practice at all, and those who did followed it only in exceptional cases.

As stated by Goetzinger, in giving Arbuckle's reasons for not storing with customers or brokers:

> "It has always been difficult for me to view as our agent a warehouseman who was always buying against us and selling his own goods against us. I do not see how a man can serve two masters at the same time when one selfish interest does not permit him to be fair" (R. 678).

Revere, too, had always refused to store with customers or brokers (R. 688). C. & H. discontinued storing with customers in 1927, because it was apparent to them that the reports of withdrawals were irregular and inaccurate (R. 710-11). Other refiners who did store with customers before the Institute confined it to a few. American, out of 9,600 customers, stored with only 25 (R. 862-3). National stored with a hundred out of 2,000 (R. 871). It would obviously be impossible for refiners to store with all or any considerable portion of their customers, both because of the economic waste and of the practical obstacles to maintaining stocks and assortments with thousands of merchants and jobbers throughout the country.

The practice was thus so exceptional and relatively rare that the discontinuance of it could not work any substantial hardship to the trade. It was, in fact, a sort of super-special concession, whereby the concessionaire was permitted to pass out secret concessions to the refiners' customers with or without the refiners' direct participation, and also to put his hands into the refiners' pockets and help himself to

whatever he could grab. The convenience or selfish advantage of the few individuals who were interested in the continuance of the practice should not be allowed to stand in the way of a trade reform that is essentially sound and economic, and that has the additional support of the strong moral considerations discussed above.

The abolition of these practices is in line with the enlightened policy of the brokers themselves. Merchandising by brokers has been specifically condemned by the National Food Brokers Association, as well as by the National Sugar Brokers Association, which Association refuses to admit to membership any broker who engages in merchandising (R. 900, 902).

The Court's Finding of an Improper Motive.

The Trial Court makes the express Finding that:

> "Defendants' purposes in compelling the separation of occupations were: (a) to assure the refiners, distrustful of one another, that no one of them could successfully use such combination to facilitate secret concessions; (b) to prevent fraudulent practices by the distribution agencies in their dealings with and on behalf of the refiners; and, most important (c) to aid in preserving the uniformity of price structure which they aimed to maintain" (Finding 79, R. 284).

There is not a shred of evidence in the entire Record justifying the Finding of the Court that price maintenance was the refiners' dominant purpose or one of their purposes in requiring the election of functions which the Court condemned. Here again, the Court strains for a sinister and

hidden motive as a basis for rejecting or minimizing the motives testified to by defendants and clearly understandable in the light of the conditions confronting them.

Reference to Finding 77 (R. 283) indicates the process of reasoning followed by the Court in arriving at this conclusion. The Court suggests that the combination of functions provides a "definite possibility" of lower prices to ultimate consumers since a concern engaged in a combination of functions has an "opportunity" to undersell competitors engaging in only one occupation. This is due to an "increased income received from two or more activities, even apart from the advantages obtained through secret concessions and frauds". This Conclusion is to be contrasted with that portion of the Opinion wherein the Court states that

> "* * * Whether if secret concessions alone had been eliminated, the combination of functions would generally have resulted in advantage or in economies in the distribution of sugar *is on this record largely speculative*" (R. 115).

In short, the Trial Court condemned the requirement of an election of functions as between brokerage, warehousing and merchandising even though he himself found that a combination of any two of these functions in a single concern (a) facilitated the granting of secret concessions (Finding 73, R. 283), (b) permitted the defrauding of refiners (Finding 74, R. 283), (c) created opportunity for double dealing (Finding 75, R. 283) and resulted in dishonesty in approximately fifty per cent. of the cases where such combinations existed (R. 114). And the Court enjoined the defendants from requiring such an election even though he himself declared that, except for the opportuni-

ties for secret concessions which such combinations provided, it was *"largely speculative"* whether they generally "resulted in advantage or in economies in the distribution of sugar" (R. 115).

We submit that a "largely speculative" advantage which *might* be present in a practice productive of the manifold evils conceded by the Trial Court affords no proper basis for the issuance of an injunction against the necessary action taken by the refiners to correct that practice, nor can it justify the Court's aspersions upon their good faith and integrity in so acting.

Alleged Harsh and Arbitrary Methods. In view of the Trial Court's denial of the legality of concerted adoption by the refiners of the basic principle that the inconsistent and incompatible offices of broker and warehouseman be kept separate from each other and from the merchandising of sugar, *even for the admitted purpose of eliminating discrimination and fraud,* it is unnecessary to comment at length upon the Court's statement that this policy was effectuated in a "harsh and arbitrary manner without regard to the effect upon third parties" (Finding 80, R. 284). However, we are unwilling to pass over in silence a characterization which we believe to be wholly unwarranted.

In support of this Conclusion the Court refers to the fact that after a warehouse was found to be affiliated with a broker or buyer, application for reconsideration had to be made by an Institute member. In the first place, any finding of affiliation was made by the Executive Committee only after reviewing the results of a careful investigation by the Institute, together with any facts submitted by the member using or proposing to use a concern alleged by another member to be affiliated. If the member interested

felt that a finding by the Executive Committee of affiliation was incorrect, he could request that the Board of Directors review the entire matter. A concern found to be affiliated was certainly not prejudiced by the rule that a further investigation and review at some later date would be undertaken only upon application by a member. The effect of this entirely reasonable rule was merely to require a concern, *previously found to be affiliated,* to convince the refiner desiring to employ such a concern that the previously existent affiliation had ceased. If convinced that the situation had been corrected, a refiner desiring to employ such a concern would certainly request further consideration of the concern in question.

Alleged Special Cases. The remaining Findings of the Court in support of its conclusion that the policy against combination of functions was effected in a harsh and arbitrary manner are all to the effect that in certain "special cases" the evils ordinarily inherent in the practice were "so remote as to be virtually non-existent" and the policy was applied to "honest" concerns as well as to "the dishonest".

We submit that it was neither unreasonable nor arbitrary for the refiners to insist upon dealing only with those brokers and warehousemen who were not engaged in other functions wholly inconsistent with their fiduciary duties as agents of the refiners by whom they were employed, merely because some such agents *might* remain honest, ignore the opportunity and resist the temptation of "double dealing" which was constantly present. Since a combination of functions was on its face wholly inconsistent with the proper performance of those duties for which these agents were employed, and since, as found by the Trial Court, dishonesty was just as prevalent as honesty, the complete elim-

ination of those practices giving rise to the abuses was the logical, practical and reasonable policy to adopt.

The Court's Proposed Alternative.

Characterizing as harsh, arbitrary and drastic what was, it is submitted, the obvious, proper and entirely reasonable principle adopted by the refiners, the Trial Court finds it "reasonably certain" that the refiners could have protected themselves against frauds and the granting of unauthorized secret concessions and discrimination by their agents who combined these inconsistent functions, by other means which would "*probably* have proved no more difficult or expensive than the means actually adopted" (Finding 81, R. 284). Reference to the Opinion discloses that the "other means" preferred by the Court consist merely of "the collective effort of all of the refiners" for the purpose of determining "by investigations, which brokers and which warehousemen *were worthy of confidence*". The Court concedes that "it might well have been necessary to devise an elaborate system of investigations, inspections and circulation of data, such as those employed in the *Cement* case to deal with fraudulent practices", but goes on to argue that:

> "Such investigations, inspections, circulation of data and the like, if they had proved necessary, certainly should not have taxed unduly either the finances, the efficiency or the ingenuity of the Institute. The record abundantly reveals the Institute's unlimited resources in these respects. The means actually adopted by defendants to deal with this problem necessitated very extensive and expensive activities on their part" (R. 123).

The Court's optimistic advocacy of a method of correcting the evils in the industry which the refiners *might have tried and found effective,* is unwarranted by any evidence in this case. The policy adopted by the refiners was not only reasonable on its face but was far more practical, simple and effective than that now proposed by the Court. The refiners struck at the root of the evils by eliminating the conditions which engendered them. The Court proposes the continuance of those conditions, coupled with redoubled efforts on the part of the industry to detect the abuses which the conditions inevitably produced.

It was a far easier undertaking to determine the existence of a combination of inconsistent functions than to detect the abuses which the combination invited. During the entire four years of the Institute's existence it was necessary to investigate only 86 out of 1,360 brokers used by members, and in only 39 cases did they make a finding of "affiliation" (a concealed combination of functions) (R. 123, Ex. K-16). It was necessary to investigate only 135 out of 1,483 warehouses used by members and in only 71 cases was affiliation found to exist (R. 123, Ex. L-16). At no time was it necessary for the Institute to employ more than three investigators (R. 904-5).

However, if the refiners' agents were permitted to exercise the dual or even triple inconsistent functions of brokers, warehousemen and jobbers, as required by the Court, repeated and continued investigation and surveillance of every broker and warehouseman so acting, would have been essential. Instead of conducting, as they did, a total of 221 investigations in four years to determine the comparatively simple question as to whether there existed a concealed combination of functions, the defendants would have had to set up a vast organization of auditors and investigators,

and undertake practically a constant surveillance of the daily transactions of nearly three thousand brokers and warehouses scattered all over the United States. It would have been utterly impossible to carry out such a program, despite the Court's wholly unwarranted assumption that the Institute possessed "unlimited resources in these respects" (R. 123).

The practical impossibility of guarding against the perpetration of frauds upon the refiners by double and triple function agents is clear from the Record. The two largest refiners who did most of the storing with customers employed traveling auditors to check consigned stocks and to detect instances of delayed billing. In the great majority of cases the auditors had little chance of detecting fraudulent practices. They could check the stocks only periodically. The rest of the time the purchaser was in complete control of the situation. No one was there representing the refiner to watch each and every delivery made by the customer to himself. No amount of checking could verify the dates upon which the purchaser took the sugar from himself as warehouseman.

The only way the auditors could detect any irregularity was by making a physical count of the stock against the refiner's records of the stock that should be on hand, on the day the auditor happened to be at the warehouse, and if there was a shortage the auditor would know that billing was being delayed. But then the purchaser could always excuse the discrepancy by saying that the missing sugar was "just taken out last night and he had not had a chance to report it", or by inventing any one of a dozen other plausible explanations (R. 1105-10).

Brokers readily admitted the manner in which, by juggling their warehouse records, they insured themselves

against detection upon the periodic visits of the refiners' auditors (R. 1049-51, 1051-2, 1054-5, 1105-10).

The Edgar Example.

The chaotic conditions and practices resulting from the combined brokerage, warehousing and merchandising operations of the powerful Edgar organization, despite the efforts of the refiners to protect themselves by means of investigations and audits, evidence both the necessity and the reasonableness of the policy adopted by the refiners in requiring an election of functions by their agents. The "plus and minus" system of the Edgar organization, as testified to by Beebe, is a shocking example of the broker-warehouseman exercising his control over the refiner's sugar to enrich himself as merchant at the refiner's expense. Beebe's attempt to explain the intricacies of this racket involved him in such extreme difficulties that the Court itself was moved to state:

> "* * * I confess I cannot understand that transaction either factually, legally, morally, or in any other way" (R. 495).

Under this system, Edgar helped himself to refiners' sugar consigned to his care *as broker* at some point such as Chicago and sold it for his own account *as merchant*. The refiner was not advised of the transaction and Edgar merely entered a minus figure on his record of the refiner's consigned stock and a plus figure against the stock of sugar of the same refiner which Edgar held as merchant at some other point such as Detroit. When, *at some later date,* Edgar sold the Detroit sugar, he reported the sale of the Chicago sugar *at the price of the subsequent Detroit sale*

(R. 495-6). When the refiners' price had dropped between the date his sugar was actually sold and the date on which the sale was reported by Edgar, the losses sustained by the refiners as a result of Edgar's double dealing were often very large. When, however, the price had risen in the interval, there is no evidence that the refiners got the benefit of the rise.

Edgar found that by this post-graduate system of "plus and minus" manipulation, he could delay the reports of withdrawals as much as six months and thus take advantage of an eighty point drop in the market between the time the sugar was actually sold and when it was reported (Ex. G-2, N-9, O-9).

Stubbs, Vice-President of American, testified that after a series of audits made by American disclosed large shortages in the stocks consigned to Edgar at Indianapolis, Cincinnati, Dayton, Detroit, Buffalo and Cleveland, Edgar was finally forced to furnish reports showing unreported sales in some cases as far back as nine months previously and to make restitution therefor (R. 1073-9).

The various shortages which had been discovered and reported to American by its auditors and for which payment was ultimately made by the Edgar organization, were discussed by Stubbs with Beebe of the Edgar organization at a conference on March 8, 1930. (R. 1074). At this conference Beebe made no attempt to meet Stubbs' accusations by any claim that American knew of or consented to Edgar's fantastic and shocking "plus and minus" system which he admitted on the witness stand but, as testified by Stubbs, said that

> "* * * he would have to admit that my charge of gross negligence on the part of the Edgar organization in handling our consigned stocks was jus-

tified. He attempted to explain that those irregularities were inevitable as a result of the large volume of business which passed through the hands of the Edgar organization and particularly because of the various guises under which the Edgar organization had operated in the past. * * * What I gathered from his use of the term 'various guises' was that during the past year, operating as the Edgar organization or as brokers, warehousemen, merchants, truckmen and transportation agents, in fact, in almost every element involved in the field of refined sugar distribution, *the combination of those elements, many of which were conflicting, brought about some of these conditions which we were discussing at the time of our conference in March*, 1930" (R. 1074-5).

"* * * He stated that his so-called manipulations *were the direct result of Edgar's acting as a general broker or in connection with his merchandising activities* and were due to arrangements made for the sale of certain sugars to certain customers and they supplied these sugars from other refiners' stock or stocks which Edgar himself owned and when he found he was short of sugar he simply replaced those stocks he had previously sold by helping himself to our sugar" (R. 1078).

Again, Stubbs testified:

"* * * I reported to Beebe that we had evidence that sugars on our contracts, which were ostensibly for delivery to firms in Detroit, had been transited on to interior points in Michigan and D from Cs issued showing delivery in Detroit. Edgar had billed the customer at the established Grand Rapids rate and had cleared for some one other than ourselves the difference between the proper rate at Detroit and the rate at the interior Michigan points.

> Beebe's answer to that was * * * that his clearing machinery had broken down because of the magnitude of the business *and the various guises under which his organization had operated"* (R. 1078-9).

Referring to the notorious "Mesch deal", whereby the Edgar company purchased in the name of a dummy sugar consigned to it as a broket, with which Stubbs confronted Edgar and which Edgar himself admitted was "a disgraceful thing", Edgar protested in Court that

> "* * * This elaborate scheme of deception of 2 of my refiner-principals was conceived by employees for my benefit without prior knowledge on my part" (R. 476).

Concerning his refusal to permit inspection of essential documents in connection with an investigation of the transiting activities of the Edgar brokerage, warehousing and merchandising organization, Edgar admitted in Court that

> "* * * Our position that we would not allow our organization or the Detroit Harbor Terminals to show those documents to the refiners' or the Institute's representatives would have defeated and did defeat the refiners' attempt to find out whether we were dealing with them unfairly" (R. 479).

Beebe went further and admitted that:

> "* * * Even if we had given the refiners access to our records they could not determine whether or not their transit billing had been used to defeat their freight application on a sale of their sugar.
>
> "Since the refiners had no means of determining from Edgar & Sons' records what particular sugar went out in a particular car I know of no way they could determine whether the transit billing had been

illegally used to transit * * * water-borne sugar. As long as we were merchandising we never kept lot cards connecting incoming with outgoing shipments, except for one period in 1930.

* * *

"When merchandising, all Edgar & Son had to do in order to use transit billing illegally was to take the sugar by mistake or otherwise from a particular section of a particular floor instead of from another section of that same floor" (R. 493-4).

Illegal transiting was admitted by Edgar, although perhaps this practice may also have been perpetrated without his knowledge by the same employees who perpetrated the "Mesch deals" for his benefit (R. 480).

American was not the only refiner victimized by the Edgar organization. National's experience demonstrated the imperative necessity of the policy of requiring a complete and absolute separation of functions. Castle, of National, testified that National first employed W. H. Edgar & Son as brokers in the latter part of 1928 and consigned stock to the care of Edgar in Detroit and Cincinnati in the early part of 1929. In November of 1929 McGrath, National's auditor, advised Castle that he found it impossible to check the stock which National had on consignment in the Detroit Harbor Terminal Warehouse (R. 1088). Upon receipt of this information Castle conferred with Beebe and other members of the Edgar organization who admitted that the records of the Edgar organization were in confusion, that it was impossible to check up the stock without months of labor, and stated that *"this condition was the result of confusion arising from their merchandising activities"* (R. 1088). The matter was finally settled

through payment by Edgar of $1,250 to cover the shortage eventually disclosed (R. 1088).

The same difficulty was experienced with the National stock consigned at Cincinnati under the control of Edgar. A large shortage in this stock was discovered in December of 1929, which Beebe explained as resulting from Edgar's merchandising activities. This matter was likewise settled through payment by Edgar of $4,100 to cover the amount of the shortage finally agreed upon (R. 1089).

Spreckels' Experiences with Edgar.

Stone, Executive Vice-President of Spreckels during the years 1929 to 1931, inclusive, testified that during the year 1929 he was ignorant of the fact that Edgar was delaying billings on sales of Spreckels consigned stocks, reporting sales of Spreckels stocks at a date subsequent to the date of sale and at a price lower than that actually prevailing on the date of sale, and specifically denied the existence of any such understanding or agreement as was testified to by Beebe in the course of his incredible "plus and minus" explanations. Harper likewise repudiated the testimony of Beebe in this connection (R. 1090, 1093).

An indication of how the "plus and minus" scheme really worked was revealed in the unfortunate experiences of Spreckels in its relations with Edgar. In the latter part of 1929 Ketcham, of the Spreckels organization, advised Stone that Spreckels was not receiving withdrawal slips from the numerous warehouses holding Spreckels sugar subject to Edgar's order. Ketcham was sent to Detroit to establish headquarters there for the sole purpose of watching Edgar, and Spreckels communicated with these warehouses, requesting reports showing the amounts of sugar

on hand and the exact dates upon which sugar had been withdrawn (R. 1090). The reports received from the warehouses were then forwarded to Edgar *who furnished invoices covering the amounts of the shortages disclosed by the warehouse reports.* The dates appearing on such invoices, however, were in many instances weeks or months *subsequent* to the delivery dates reported by the warehouses, and the prices specified on such invoices were *lower* than the prices prevailing on the delivery dates reported by the warehouses (R. 1090; Ex. C-2 to F-2, U-9 to Z-9, O-3).

Thousands of bags were involved and the differences between Spreckels' prices on the delivery dates reported by the warehouses and the Edgar invoice prices represented very large sums.

Ketcham also testified that, during the course of his investigations in Detroit in 1930, he discovered that Edgar was reporting to Spreckels *as deliveries at outlying points,* such as Battle Creek, *deliveries which had actually been made in Detroit.* The freight bills on the alleged shipments from Detroit to such outlying points, furnished by Edgar or the Detroit Terminal Warehouse to Spreckels and paid by Spreckels did not in fact cover shipments of Spreckels sugar but sugar of some other brand. If Edgar had truthfully reported to Spreckels the deliveries which were actually made in Detroit, Spreckels would have secured the benefit of a freight pick-up of 12 or 13 cents a bag, the freight application in Detroit being higher than the cost to Spreckels of placing the sugar at that point. The freight application at Battle Creek, however, was 2 cents *less* than the total represented by the cost to Spreckels of getting the sugar to Detroit, *plus* the cost of the local freight from Detroit to Battle Creek, where Edgar falsely reported the Spreckels sugar as having been sold and delivered. In

short, on every delivery of Spreckels sugar in Detroit, incorrectly reported to Spreckels by Edgar as delivered at an outlying point, Spreckels was out-of-pocket a substantial sum (15 cents per 100 lbs. in the case of Battle Creek and corresponding amounts in the case of other points) (R. 1096-8; Ex. N-2).

Stone and Ketcham both emphatically denied the truth of Beebe's incredible testimony that such a practice had been sanctioned by them (R. 1091-4). It could not have been carried on without the connivance of the Detroit Harbor Terminal Warehouse, the management of which during that period was under Edgar's domination. The Trial Court states that

> "* * * It is entirely clear that the vast size and ramified activities of the Edgar organization led to *some irregularities* in dealings with the refiners" (R. 117).

and further concedes that

> "* * * some of the Edgar representatives were not *overly scrupulous* in dealing with the refiners" (R. 117).

In view of the overwhelming weight of the evidence in the Record, only a small portion of which has been touched upon in the preceding pages, it is submitted that the Trial Court's characterization of the nature of the Edgar operations is a striking understatement. The evidence goes much farther than necessary to justify completely the policy against combination of functions adopted by the refiners.

Broker and Warehouse Agreements.

With respect to the "Broker and Warehouse Agreements" the Court, in its Opinion, states as follows:

"The Institute recommended that all refiners should obtain from each broker and from each warehouseman an agreement in the form recommended by the Institute. The evidence is clear that the refiners understood that they were not to deal with any broker or warehouseman who did not sign such an agreement. The evidence also shows beyond question that the Institute checked upon the several refiners and saw to it that this understanding was carried out" (R. 124).

"To the extent that the brokers' pledge imposed an obligation to support defendants' actions generally, it is plainly an unreasonable restraint inasmuch as those actions are themselves in large part so. The requirement that brokers refrain from giving rebates is subject to like condemnation, although refiners, independently, might well impose such a restraint on their agents. I reach a similar conclusion with respect to the agreement requiring warehouses to refrain from rebates and concessions to any customers with a penalty for its violations. Defendants professed aim of preventing secret arbitrary discrimination could have been realized by less drastic means" (R. 252-3).

The Court in its Decree (R. 322) enjoins the defendants from concertedly

"Obtaining, requesting, exacting or attempting to exact pledges or uniform contracts or obligations from any broker as part or in aid of any program enjoined by this decree;

"Obtaining, requesting, exacting, or attempting to exact non-rebating agreements from any broker, warehouseman or trucking concern."

It is submitted that both the Conclusions arrived at and the injunction against the actions in question are erroneous.

The propriety of the refiners requiring their broker-agents to "conscientiously uphold the spirit and letter" of the Code depends upon the propriety of concerted adoption of and adherence to the Code by the refiners themselves. If the refiners themselves were justified, as it is submitted they were, in agreeing not to discriminate between their customers by the giving of special rebates and concessions, they were clearly justified in requiring their own agents not only to refrain from the same practices, but also to agree that they would so refrain as a condition precedent to their employment as agents.

Paying Brokerage to Customers and Splitting Brokerage Fees. One of the forms of concession employed before the Institute was the payment of so-called "brokerage" to a customer. The customer, of course, performed no brokerage service and the payment was not considered as brokerage, but was merely called brokerage to disguise the concession (R. 866, 112). Obviously, if discriminations of this type were to be abolished and sugar to be sold upon open prices publicly announced, discriminatory concessions in the form of "brokerage payments", as well as other concessions, had to be eliminated.

Similarly, if the refiners were to avoid discriminating between customers through the payment of "brokerage" or other concessions, it was necessary also to avoid the splitting of brokerage by the refiner's brokers with the customers of the refiner (R. 891-2). Certainly, if it was discriminatory for a refiner to grant secret concessions to buyers through the direct payment of so-called "brokerage fees", it was equally discriminatory for refiners to permit the brokers, their own agents, to pass on part of the brokerage fees to the buyers.

This occasionally encountered practice of a broker splitting brokerage was condemned by the Code Interpretations (Ex. 20, Sec. V, p. 1, par. 1(a)). The National Sugar Brokers Association and National Food Brokers Association had adopted the principle of not splitting brokerage as the cornerstone of their associations, and required all applicants for membership to pledge themselves not to split brokerage. The Sugar Brokers Association comprises the leading sugar brokers of the country and the association has been in existence and its cardinal principle against splitting brokerage recognized for more than thirty years (R. 899-900, Ex. E-6). The refiners adopted the same requirement for all of their brokers, not only because of the inherent soundness of the principle both economically and ethically, but also at the behest of the sugar brokers themselves, members of the National Associations (R. 898). The Trial Court refrains entirely from any discussion of this matter, but nevertheless enjoins the refiners from concertedly attempting to secure "non-rebating agreements from any broker".

Conclusion as to Brokers and Warehousemen.

Having agreed to abolish the evil system of secret concessions and discriminations, the refiners would have made the Institute principle a hollow mockery if they had not taken effective steps to see that their agents, the brokers and warehousemen, did not violate the principle. The evidence shows conclusively that no steps short of the ones they took would have been effective to that end. They took those steps only after more than a year's trial of milder methods had failed. We submit that they were justified in their

action not only by the Institute principle, but also because it was necessary in order to protect themselves from imposition and fraud.

C. MISCELLANEOUS ACTIVITIES.

In this section of the brief, we discuss as briefly as possible nearly a score of the specific Code Interpretations which were adopted by the defendants, as experience under Institute conditions indicated they were necessary, in order to prevent the giving of secret concessions dressed up in honest clothes.

The Trial Court condemned these Code Interpretations and practices because, in line with his suspicion that the defendants had a dominating improper motive mixed up with their proper motives in organizing the Institute, he suspected that this same improper motive was at work in everything they did to make the Institute principles effective. He therefore condemned substantially every practical measure of this sort adopted by the defendants, either on the ground that their motive was bad, or that some other means proposed by the Court or left to the imagination would have stopped the evil aimed at without limiting the occasional use of the prohibited practice for purposes that were honest. In all of these Findings he ignored the uncontradicted testimony of the defendants as to their purposes in adopting these measures, and disregarded the uncontradicted evidence that practical experience in the sugar trade and under Institute conditions had proved the measures to be necessary if secret concessions and discriminations were to be abolished.

(a) Damaged Sugar and Frozen Stocks.

In answer to inquiries from members, in the early days of the Institute, Code Interpretations were adopted stating that concessions in price made in order to dispose of damaged sugar and frozen stocks would not be considered a violation of the fundamental principle of the Code that sugar should be sold only upon open prices and terms publicly announced (R. 975, Ex. 20, Sec. I. p. B 1, par. 2 (a) (b)).

It should be explained that "frozen stocks" are not damaged or inferior sugar. They are of standard grade and quality, but are excessive stocks of stored or consigned sugar which are not salable in the usual course of business in the sections where they are stored. They are in effect *"stranded" stocks.* Some change in consignment practices or other trade conditions has left them marooned in a local warehouse, and it is not practicable to move them elsewhere and sell them at the current price, because of the excessive cost of transportation. They must therefore be put on the local bargain counter and sold for what they will bring. If kept in storage long, storage charges would eat them up, and they would also deteriorate in quality, and would then become "damaged" sugar (R. 974-5).

It was realized, however, that there was danger that refiners disposing of such sugar at a concession below their openly announced price might be charged, by persons who did not know the facts, with giving secret concessions and thus discriminating between customers (R. 975). It was likely that the trade would hear of the sale below the refiner's list price but be unaware of the circumstances justifying the concession. Members were therefore requested to:

> "* * * give prior notice to the Executive Secretary of the Institute of the location and amount of such sugar with a statement as to its condition and the necessity of selling it at a concession, in order that the Secretary may be prepared to answer complaints that may be made against the member for selling sugar at other than an open price publicly announced" (Ex. 20, Sec. I, p. B 1, par. 2(a) printing of 11/26/28).

With respect to this provision of the Code Interpretations, the Trial Court found as follows:

> "Notice *after* rather than *before* such sales would serve the purpose of informing the Institute as to the facts, so that it would be able to meet charges from members or others, of arbitrary concessions by refiners. The notice before sale did enable interference with legitimate sales and was sought and used by the Institute not only to meet charges of arbitrary concessions, but to restrict and control such sales and thus to prevent market disturbances and to preserve the price structure" (Finding 198, R. 310).

Although we believe that the Finding of the Trial Court with respect to the purpose and effect of the provision in question is contrary to the evidence, we shall not ask this Court to undertake the burden of reviewing the Record in this connection. Prior notice is not essential to the Institute's declared purpose of answering inquiries with respect to sales of this type. Notice to the Institute of such sales, after they have been completed, is sufficient and had, in fact, become the established practice even prior to the institution of this suit (R. 975-6).

Appellants, however, are compelled to urge the error involved in two further Findings of the Trial Court in this connection:

> "Defendants also agreed, without substantial justification, that frozen stocks and damaged sugar should not be applied to any contracts not originally calling for them; and that damaged sugar or frozen stocks should not be sold except in spot transactions" (Finding 199, R. 310).
>
> "The restraints that defendants imposed on sales of damaged sugar and frozen stocks were undue and unreasonable" (Finding 200, R. 310).

The first clause of Finding 199, quoted above, refers to the following resolution which was adopted at a meeting of the Board of Directors of the Institute on January 29, 1931:

> "WHEREAS, the application of frozen stock or damaged sugar on contracts not calling for such sugars affords an opportunity for discrimination and unfair practice,
>
> "BE IT RESOLVED, that it is recommended that frozen stocks not to be replaced and damaged sugars be not applied to any contract not originally calling for them."

The reasons for the adoption of this recommendation were testified to by Taylor, Executive Vice Secretary of the Institute (R. 979). The application of damaged sugar or frozen stock, at a reduced price, to a contract calling for good sugar at the refiner's published price, was considered objectionable for two reasons. In the first place, it involved the repricing, to a single customer, of a contract originally entered into on an entirely different basis. It

was thus a discriminatory concession to that customer and was in conflict with the principle of open prices publicly announced. In the second place, it opened a wide door to discriminatory practices. If a number of buyers had entered contracts at the same price and the price of sugar declined shortly thereafter, buyers would ordinarily prefer to accept damaged sugar or frozen stock at a concession rather than fulfil the terms of their original contracts. Since this could not be done for all buyers, obviously it would be unfair to do it for one or a few favored customers, who might thus be made the beneficiaries of large concessions through a practice of diverting to them so-called damaged sugar which was not really damaged, or so-called frozen stocks deliberately accumulated at strategic points for the purpose of facilitating such discriminations. However, as Taylor pointed out, this recommendation, of course, did not preclude refiners from making original straight out contracts for the disposal of damaged sugar or frozen stocks as such (R. 979).

It is submitted that the recommendation in question was not an undue or unreasonable restraint of trade, but, on the contrary, was entirely reasonable and justified by the purpose for which it was adopted.

Selling Damaged Sugar and Frozen Stocks only in Spot Transactions. Finding 199 (R. 310), that defendants "agreed, without substantial justification * * * that damaged sugar or frozen stocks should not be sold except in spot transactions" and that this "restraint" was "undue and unreasonable", is similarly contrary to the evidence. It is based upon a minute of an Executive Committee meeting of February 28, 1929 stating that

> "It was the consensus of opinion that a proper interpretation of the Institute Code Ruling on dam-

aged sugar would be that all sales of damaged sugar at a concession should be spot sales" (Ex. 21-26, p. 215).

Referring to this minute, Taylor testified that

> "* * * it was stated that since it has always been the practice of the trade to sell such sugar as spot transactions and 'as is' without guaranties or other concessions, such practice should be continued. This was merely a stated consensus of opinion recorded in the minutes and no formal action of reducing it to a recommendation was made" (R. 976).

We submit that this interpretation of the Code provisions in the light of the established practice of the trade, even if it had taken the form of a formal recommendation, certainly does not constitute an "undue and unreasonable" restraint of trade within the meaning of the Sherman Act.

It amounted merely to the informal approval of an established practice, the continuance of which would discourage the tendency to grant secret concessions by dressing them up in the guise of "damaged sugar" sales.

(b) Tolling.

A "tolling contract" in the sugar industry refers to an arrangement occasionally made by which a large purchaser, instead of buying a quantity of refined sugar at the market price, furnishes the refiner with a cargo of raw sugar, receives in exchange an equivalent quantity of refined sugar, and pays the refiner a differential sum per hundred pounds. The refined sugar is taken from the refiner's general stock and does not represent the product of the raw sugar received by the refiner under such an arrangement (R. 1028). The term "tolling contract" is a misnomer, since the ar-

rangement represents essentially a mere purchase of raw and sale of refined sugar. A tolling contract in the sugar industry merely enables the owner of a cargo of raw to sell raw and purchase refined sugar by paying an agreed differential in price.

The price differential paid by the owner of the raw sugar was, of course, embodied in a provision of the tolling contract. No announcement to the trade was ever made by any of the refiners of the terms on which tolling contracts would be accepted nor that the refiners would accept all cargoes for tolling offered by their customers. The refiners granted the tolling privilege to some customers and denied it to others, and as among those customers to whom the privilege was granted varied the price differential as each tolling contract was executed (R. 1028). Tolling contracts were by their very nature essentially discriminatory.

As recognized by the Trial Court, tolling contracts "were not common, however, and were always a matter of special arrangement" (Finding 167, R. 304). Only large buyers and large raw sugar purchasers could afford to finance the amount involved, and the refiners, as a rule, were reluctant to accept the contracts. National, for example, during the period prior to the Institute had tolling contracts only in 1924 and 1925 and then only for small amounts (R. 1028). This reluctance of the refiners was due to the fact that the tolling contract was an out of the ordinary arrangement, upset the balance between raw and refined and interfered with the ordinary movement of sugar to the refiners' customers. Tolling contracts could be offered to only a few buyers and not to any considerable part of the refiners' customers.

With respect to this subject the Trial Court has found that:

> "After a tolling contract made by a refiner with a manufacturer in July, 1928, was condemned by the Institute as a Code violation, defendants agreed not to make and concertedly refused to make tolling contracts for any purchasers of refined sugar. They further agreed not to toll and concertedly refused to toll for raw producers, except after exacting an agreement from such producers to sell the tolled sugar in accordance with the Code (Finding 169, R. 304).
>
> "Defendants' dominant purpose in prohibiting and regulating tolling was not as claimed, to prevent unfair discrimination but to prevent sales of sugar at prices, terms and conditions which would jeopardize the price structure (Finding 170, R. 304).
>
> "Defendants' restraints on tolling were undue and unreasonable" (Finding 171, R. 304).

It is submitted that the Findings above quoted are unsupported by the evidence. When, on July 24, 1928, Savannah called Judge Ballou, Executive Secretary of the Institute, and stated that it had entered into a tolling contract, Judge Ballou, after a discussion with the Executive Committee, replied:

> "The opinion was unanimous that a tolling agreement even with a manufacturer, constituted discrimination under the Code *in that it enabled one buyer to get his sugar at a price other than the open price for sugar* as announced from time to time by refiners" (Ex. 434).

On July 31, 1928, the following resolution was adopted by the Executive Committee (Ex. 21-26, p. 89):

> "RESOLVED, that any contract or agreement entered into by a member of the Institute by which a *manufacturer, jobber, or other buyer or user* of sugar is enabled to obtain refined sugar at a price other than the open prices as announced from time to time by refiners, is discriminatory and is condemned by Paragraphs 1 and 3 (a) of the Code of Ethics."

It will be observed that this resolution is nothing more than a repetition of a provision of the Code (Ex. 434-A). Its general terms, of course, applied to tolling contracts which had not been entered into in accordance with terms publicly announced. It did not apply to *raw sugar producers* because they are not customers of the refiners, but are competitors in so far as they may dispose of their product in the refined state.

On January 17, 1929 the following resolution was adopted (Ex. 21-26, p. 188):

> "RESOLVED, that a refiner should not enter into any tolling arrangement under which he does not retain entire control of the sale of his product in order that it may be sold in accordance with the Code of Ethics."

This resolution does not deal with customers of the refiners in the ordinary sense; it is intended to cover raw sugar producers having their product tolled by the defendants (R. 1030, Ex. 434-N). If raw sugar producers sold refined sugar obtained under tolling arrangements at secret and discriminatory prices the refiner members "would be contributing to the breaking down of their own purpose in

adopting the Code" (R. 1030). The resolution of January 17, 1929 recommended that if a refiner lent his facilities to a raw sugar producer he should insist that the refined product be sold only upon open prices and terms (R. 1030).

The two resolutions above quoted appear in the Code Interpretations (Ex. 20) as Section I, Page C1, Paragraph 2, and, together with the first principle of the Code, that sugar should be sold only upon open prices without discrimination, constitute the only expression of the Institute with respect to tolling contracts (R. 1030).

The defendants did not at any time agree to eliminate or prohibit tolling contracts. The Institute resolutions on the subject *do not condemn tolling contracts so long as they are offered to all customers.* The refiners have not, in practice, entered into tolling contracts with any of their *customers.* This was apparently due to the fact that such arrangements had never been common, and that it did not seem practicable to make any general offer of such contracts. They have continued to toll for *raw sugar producers,* although properly requiring an assurance that the refined sugar will be sold only upon open prices without discrimination, in accordance with the basic principle of the Code.

The refiners conceived and, it is submitted, rightly conceived, that the occasional tolling contracts which had been entered into resulted in a preferential treatment to customers enjoying such contracts, because it enabled such customers to purchase refined sugar at other than the prices open to the general trade. If a tolling contract not made under an open announcement of terms available to all customers resulted in one customer obtaining sugar at a discriminatory price, such as Savannah's contract with Coca-Cola which resulted in the Code Interpretations above con-

sidered, it was both the right and the duty of the Institute to point out the violation of the basic principle of the Code.

It is not the resolutions embodied in the Interpretations that affect tolling contracts. The Code itself, by necessary implication, brands the practice as discriminatory *unless openly offered to all.* The refiners realized this before the resolutions were adopted and individually refused tolling contracts offered to them because they believed them discriminatory and in violation of the Code (Ex. 106, 434-F, 434-J, 434-H). Taylor testified to the reasons which led to the adoption of the resolutions mentioning tolling specifically:

> "* * * In the course of the discussion it was reiterated that these were violations of the Code, in that the traditional practice of sugar tolling was subject only to private negotiations between the parties interested, was not publicly announced and was therefore a direct violation of the Code principle with regard to open announcements. Secondly, that because it was not open to all buyers alike, it was necessarily discriminatory. Attention was called to the fact that if arrangements were made with owners of raw sugar or with buyers who sold their sugar in the open markets, such sugars would not be disposed of under the provisions of the Code of Ethics and therefore the refiners would be contributing to the breaking down of their own purpose in adopting the Code" (R. 1029-30).

It would have been useless for the defendants to pretend that they were opposed to secret concessions and discriminations between customers, if at the same time they were evading that principle by making tolling contracts with one or a few customers who thus got their sugar on

prices and terms which were not openly announced, or which, if they were openly announced, were not in practice available to others. If the practice had been encouraged it would have defeated the Institute's principle altogether. Large customers would simply have quit buying *refined* sugar on openly announced prices, and would have bought *raw* sugar and traded it with the refiners for refined sugar on whatever special terms, concealing rebates, their combined ingenuity could devise.

And similarly, if the defendants had not provided, in their tolling contracts with others than customers, that the sugar should be sold on publicly announced prices and terms, the Institute principle would have been defeated by the simple device of making collusive contracts with sugar pirates who, if not restrained by the agreement to sell on publicly announced prices, would go out and dispose of the refined sugar thus acquired to such customers of the refiners as were chosen to be the beneficiaries of the resulting secret concessions.

We submit that Finding 169 (R. 304) of the Trial Court that defendants' dominant purpose with respect to tolling was not to prevent unfair discrimination "but to prevent sales of sugar at prices, terms and conditions which would jeopardize the price structure" is not only unsupported by but contrary to the evidence with respect to this subject. We submit that the evidence affirmatively shows the good faith of defendants in adopting the resolutions condemned by the Trial Court, that no "undue or unreasonable" restraints were involved therein, and that these resolutions were both proper and necessary in order to avoid frustration of the basic principle of the Code.

(c) Used Bag Allowances.

Prior to the formation of the Institute, certain refiners made an allowance to National Biscuit Company and to a few other large customers for the return of empty one hundred pound burlap sugar bags which might again be used for shipments to such customer (R. 380-1). This type of allowance was first invented by Government witness Lowry, while he was operating the Pennsylvania refinery. He testified that it was a special arrangement given by him only to National Biscuit (R. 380). Lowry later became the President of National Biscuit (R. 374).

Some time after the formation of the Institute, a resolution was adopted pointing out the special nature of such an allowance and recommending against it. The basis for this recommendation was the discriminatory character of the arrangement which granted an allowance to one customer not made available to all. Under the principles of the Code, no objection could be made to an arrangement by which all customers would be allowed to return bags if they wished. Allowances for used bags are not in themselves harmful to the industry or to anyone engaged in it; they are harmful only when distributed as discriminatory favors to particular customers and it is only for that reason that they were condemned by the Institute. The difficulty was that as a practical operating matter, it was utterly impossible to handle returned bags from all customers.

After the formation of the Institute a few customers applied for used bag allowances and were refused by the refiners on the basis of the Institute's action. This fact has been admitted in the answer wherein it is stated that

> "* * * The defendants admit that the Institute recommended to members that they discontinue the

practice of making an allowance to customers for the return of used bags, or for the use of customers' bags, and recommended to members that they discontinue the use of unbranded bags, for the reason that such practices resulted in discrimination between customers, or were so open to abuse as to be likely to result in and promote such discrimination, and for the reason that such practices were unbusinesslike" (R. 31).

Goetzinger, of Arbuckle, testified to the reasons for the adoption of the Institute recommendation:

"I was present at the meeting of the Institute at which the question of allowances on used bags was discussed. I am familiar with the fact that the Institute has recommended the practice of making such allowances be discouraged. My first connection with the question of used bags was when a customer requested Arbuckle to allow him 20c a bag at a time when the new bag was costing us 12½c and I refused to do that. When the subject of used bags came up at the Institute, I said that the whole returned bag business was simply a subterfuge for giving a secret allowance, that is, crediting a larger value for the bag than it actually had. No one admitted that he had been guilty of the practice which I indicated. We discussed the general merits of the case, what could be done about it, the difficulties of receiving the bags from one or two customers, to say nothing of a great number, packing them in the refinery, filling them especially for a customer when he ordered out some sugar, keeping them clean and the unsanitary nature of the proceeding. Following this discussion the recommendation was made that these allowances be discontinued" (R. 1049).

Lieneau testified that National had commenced such a practice with National Biscuit in 1924 and limited it to two or three customers (R. 1027).

> "* * * We did not offer this privilege of returning bags to all customers because we felt that the thing would not be practical. We would be swamped with our customers' bags and it would be impossible to handle them and to keep them separately in the warehouse. In the days prior to the Institute I never heard of an open announcement by any refiner extending this privilege of using returnable bags to all or any part of his customers" (R. 1028).

As shown by the evidence above referred to, the practice of making allowances for used bags was and necessarily must be essentially discriminatory in nature. It neither was nor could be offered by refiners generally to all customers. If offered only to National Biscuit and one or two other selected customers, it constituted a preferential treatment wholly inconsistent with the basic principle of the Code. The condemnation by the Institute of such special allowances in no sense deprived the customer of the fair value of his bags since, if he had no use for them himself, he could dispose of them to second-hand bag dealers.

In view of the testimony above cited, and there is no evidence to the contrary, it is submitted that the Trial Court erred in finding that allowances for used bags "could be effected without substantial expense to the refiner" (Finding 187, R. 307), in finding that "Defendants' real objection to granting used bag allowances was not, as they claimed, that such allowances would necessarily be discriminatory but that they might conceivably be made a cloak for secret concessions" (Finding 189, R. 308), in finding

that "The practice of making used bag allowances had not been used as a cloak for secret concessions" (Finding 189, R. 308), in finding that "Defendants could readily have given bag allowances without unfair discrimination between customers" (Finding 189, R. 308) and in finding that "Defendants' activities with regard to bags and containers constitute undue and unreasonable restraints of trade" (Finding 190, R. 308).

(d) Private Brands.

Prior to the formation of the Institute, certain refiners, as a special concession to particular customers, packed sugar under the private brand of the customer. The number of private brands packed was always extremely limited, some refiners refusing to adopt the practice at all and others offering the privilege to only a few customers (R. 691, 908, 1026-7).

The practice was both expensive and uneconomic. It necessitated the preparation and use of special bags and packages instead of the ordinary bags and packages bearing the refiner's imprint. It required special sorting and handling at the refinery and the maintenance of inventories of the specially prepared bags and packages which could be used only for the particular customer whose brand was marked thereon. Since the refiner never knew on what short notice his private brand customers would require their sugar, he was forced to maintain inventories of refined sugar packed in the private brand bags and packages. The result of any private brand arrangement is inevitably the useless expenditure of labor, the multiplication of packages and the consequent creation of uneconomic waste. Worcester testified that Revere never put out any

private brands and would not do so; it "would upset our manufacturing facilities" (R. 691). Castle, of National, testified that:

> "There is a greater expense in supplying sugar under private brands than supplying it under our own trade brand because of the extra expense of storing the bags separately, the extra expense incidental to the handling of the empty packages prior to their being filled and the extra expense involved in the handling after they are filled prior to the time they are shipped" (R. 1027).

Referring to McCahan's refusal to pack sugar under private brands, Placé testified:

> "In the period before the Institute, we had requests from customers for private brands. The customers who requested them did not make any offer to pay the extra cost involved. Usually, their idea was to buy private brands below the refiner's brand. We refused them because I have always felt that *handling a private brand is a great expense, especially for a small refinery such as ours, since our packing floor and shipping floor is already congested with a great variety of assortments. If we pack one private brand, we would practically duplicate the number of assortments on our floor. It would complicate our packing and our shipping and even increase our cost of carrying inventories. It would increase the different varieties of stock we would have to have in storage and empty packages* and furthermore I felt that if we started packing one private brand, it would lead to similar proposals on the part of others, which would be embarrassing" (R. 908).

Clearly, the packing of a private brand represents an increased cost to the refiner and, since no part of the increased cost is borne by the customer receiving the same, it must inevitably be reflected in increased costs to the whole body of the refiner's customers (R. 908, 1026-7). There is not a single line of testimony to show what, if any, actual commercial advantage resulted from the packing of sugar under private brands, justifying the expense involved.

As is clear from the evidence above referred to, it was utterly impossible for refiners, as a practical matter, to offer the privilege of private brands to all, or even to any substantial portion of their customers. The special preparations, sorting and handling necessary to pack private brands made it impossible to offer the privilege openly to all customers without favor or discrimination and no such announcement had ever been made by any refiner (R. 1026). As in the case of used bag allowances, refiners granted the privilege of receiving sugar packed in private brands to only a few of their customers. The practice was necessarily and inherently discriminatory and in conflict with the basic principle of the Code of Ethics.

The practice was discussed at several Institute meetings. While no specific resolution or recommendation was adopted, the members expressed themselves as opposed to the practice and attempted to discourage it. The refiners recognized not only the uneconomic and wasteful nature of the practice but its conflict with the fundamental provisions of the Code.

> "Two evils in connection with the packing of private brands were pointed out at the meeting of August 2, 1929. The first and foremost was that

> it was a physical impossibility to offer to pack all private brands to all customers. It would be physically impossible for a refiner to pack private brands for everybody who asked for it and therefore it was discriminatory. The second was that it was a special service without appropriate charge and under the Code of Ethics was objectionable" (R. 910-11).

In the light of the foregoing review of the evidence, and there is no evidence to the contrary, it is submitted that the Trial Court plainly erred in finding that "Defendants have not shown that private brands could not have been used for all customers desiring them", in finding that "There is no substantial evidence that packing private brands entails substantial expense to refiners" (Finding 192, R. 308), and in finding that the activities on the part of defendants with respect to the packing of private brands unduly and unreasonably restrains trade.

(e) Long Term Contracts.

1. *The General Question.*

At the time of the formation of the Institute, the great bulk of all sugar was sold under contracts by the terms of which the buyer was obligated to take delivery within thirty days after the date on which the contract was entered (R. 663, 671). The outstanding exception was a special long term contract offered by C. & H. and Western to canners in the Pacific Coast states (R. 716, 882-3). With the possible exception of Revere, no eastern or southern refiner *openly announced and offered to the trade at large or to any special class of buyers,* whether canners, manufacturers or jobbers, any form of contract providing for

delivery beyond the usual thirty day period, although certain large buyers such as Edgar, Coca-Cola, National Biscuit and Canada Dry were able to secure special contracts from certain refiners permitting deliveries beyond the usual thirty day period and carrying other discriminatory concessions.

After the formation of the Institute the Pacific Coast refiners continued to offer openly to canners their special long term contract. As a consequence of the principle of open prices and terms without discrimination among customers, the special long term contracts "privately negotiated" by various eastern and southern refiners with favored customers prior to the formation of the Institute disappeared and these favored customers were placed upon the same footing as the balance of these refiners' customers.

With respect to this subject the Trial Court has made the following Findings:

> "I find that concerted action, whether in prohibiting all long term contracts or only in insisting on open announcement in advance of entering any such contract is without justification (Finding 148, R. 300).
>
> "An obligation to adhere to such open announcement would tend to prevent many entirely fair contracts. While the abolition of long term contracts was effected largely through defendants' definite agreement, the requirement that prices and terms must be openly announced in advance of sale aided in the elimination, because many long period contracts would necessarily have to be arranged by private negotiations" (Finding 149, R. 300).

The evidence does not support the conclusion of the Trial Court that appellants engaged in concerted action

"prohibiting all long term contracts" (Finding 148, R. 300). However, no useful purpose would be served by discussing the evidence relating to this Finding, because the defendants not only did not prohibit all long term contracts, but they never had and do not now have any desire to prohibit them. The Court's injunction against such action therefore does not disturb them.

But the defendants are seriously prejudiced by the further erroneous Finding of the Court that "concerted action * * * in insisting on open announcement in advance of entering any such contract * * * is without justification" (Finding 148, R. 300). The Trial Court here condemns as unlawful a particular application of the basic principle that all sugar should be sold only upon open prices and terms, without discrimination among customers, which principle admittedly was concertedly adopted by appellants. Appellants contend that they may lawfully refrain from granting to individual customers contracts involving special prices, terms and conditions which the refiner does not openly announce as available to all of his other customers who may desire to accept them. The Trial Court states that "many long period contracts would necessarily have to be arranged by private negotiations" and consequently the requirement that refiners adhere to their openly announced prices and terms "would tend to prevent many entirely fair contracts" (Finding 149, R. 308). We submit that a contract "arranged by private negotiations" and embodying prices, terms or conditions that are not openly announced and extended to all of the refiner's customers who desire to accept them, is not a "fair contract" (Finding 144, R. 300) but is necessarily and of its very nature discriminatory.

Referring to the specific question whether it would be reasonable to require that such special long term contracts be announced in advance of their execution, we submit that there are sound reasons for such a requirement. These special contracts have intricate provisions, and could readily be devised in such a way as to cover deliberate and unfair discriminations between customers. Special terms could readily be inserted for the purpose of making such a contract unacceptable to more than the particular favored customer or customers with whom it was negotiated, or to make it unacceptable for more than a day or two during a given stage of the market. Unless announcement of these special terms were made promptly, in time for other customers to consider them and determine whether they also desired to buy sugar on such terms over an extended period, the offer of the terms could be withdrawn before acceptance by other customers, with the result that a seriously unfair discrimination would have been perpetrated, in spite of a seeming compliance with the principle of public announcement.

Postponement of the announcement until after the contract had been executed and the sale made and the terms perhaps withdrawn, as proposed by the Court, would leave the other buyers that were thus discriminated against entirely helpless, except for such moral pressure as they might bring to bear on the guilty refiner by complaining that he had been unfair to them. In the case of such specially complicated contracts, such complaints might not be effective, because it could plausibly be explained that a change in market or other conditions made it impossible to continue the offer.

These special long term contracts would have opened a very wide door to evasions of the Institute principle that unfair discriminations between customers should be abolished, and vigilance was required to see that there was real public announcement of such contracts so that all customers to whom they might be acceptable would have a fair opportunity to take advantage of them. We submit that the defendants' action in this matter was reasonable and proper.

2. *The Special Edgar Contracts.*

In conection with the subject of long term contracts, the Trial Court refers to two special contracts secretly entered into by Edgar with Godchaux and Revere immediately before the formation of the Institute. Under the Godchaux contract, Edgar was to obtain 10,000 to 15,000 bags of sugar per week *at a concession of 20c under the market price of American, National and Godchaux for a period of two years commencing December 1, 1927.* Under the Revere contract, Edgar was to obtain 1,000 to 5,000 bags of sugar per week *at a concession of 10c per bag for the period of one year commencing December 10, 1927* (Opinion, R. 178-9).

The existence of these Edgar contracts was a serious threat to the very existence of the Institute. Although, with the formation of the Institute, refiners pledged themselves in the future to sell only upon open prices and terms publicly announced, without discrimination among customers, Edgar, who was broker for several of them, was, in his capacity as a merchandiser of sugar, for a period of one year guaranteed the delivery of 5,000 bags of sugar per week at a concession of 10c per bag, and for two years

guaranteed the delivery of 15,000 bags per week at a price *20c below that offered to any other buyer in the country.*

Had the holder of these contracts been a manufacturer such as Coca-Cola or Canada Dry, the discrimination against other buyers of the same type would have been bad enough. The situation was made infinitely worse by virtue of the fact that Edgar, the largest sugar merchant in the United States, and also broker for several refiners, was reselling this sugar in competition with every wholesaler and jobber in the middle west. Had Edgar elected to initiate a price cutting campaign, as he could easily afford to do by virtue of these 10 and 20c concessions, he could have driven out of the sugar business every buyer in the middle west with whom he came into competition.

The refiners were helpless to remedy the situation. Godchaux had guaranteed Edgar a 20c concession not only under its own price, but under the price of National and American as well. No matter how far Godchaux might cut the price to other buyers, Edgar was entitled to a still lower price. No matter how far American and National might cut the price to their own buyers, Edgar was still entitled to a 20c concession. Edgar was in a position to cut the throat of every last one of his competitors.

Furthermore, as Edgar himself testified (R. 454, 485), he secured large quantities of American sugar and that of other refiners by an exchange of the Godchaux sugar. The merchandising by Edgar of the sugar of other refiners at a price below that openly announced by those refiners would inevitably lead to charges of bad faith, discrimination and hypocrisy being leveled against these refiners. The trade would not know when Edgar was selling at list price, as American's broker, and when he was selling at a cut price

in his own behalf, as merchant, American sugar which he had acquired by exchange. The trade would not know the peculiar circumstances enabling Edgar to offer National sugar at a price lower than that at which National's other brokers were selling. Every last refiner was exposed to the charge that the announcements made early in 1928 regarding the withdrawal of all concessions were made in bad faith, to trick and deceive the trade.

The success of the Institute's attempt to remedy the conditions prevailing in 1926 and 1927, and to restore the American sugar industry to the level of a legitimate business honestly and fairly conducted, depended largely upon the cooperation of the trade generally. To undermine the confidence of brokers, of buyers, and of the trade at large in the integrity of purpose of the members of the Institute at the very outset of its existence was necessarily to invite further disaster.

Furthermore, the Edgar-Godchaux contract was in and of itself a violation of Section 2 of the Clayton Act, since Godchaux bound itself under any and all circumstances to sell to Edgar for a period of two years at a price 20c below the price at which Godchaux sold to its customers generally, thus placing in Edgar's hands the power to drive other merchants out of the sugar business. The Edgar-Revere contract was also probably a violation of the Clayton Act.

Judge Ballou, the Executive Secretary of the Institute, recognized the gravity of the situation and, as found by the Trial Court, "sought and obtained from Edgar an assurance that he would maintain refiners' prices and not take advantage of the opportunity afforded by these con-

tracts to cut prices" (Finding 152, R. 301). If they had not attempted to get such an agreement, the refiners would have been guilty of betraying their other customers, and would have been threatened with the collapse of the Institute and the abandonment of the principles for which it stood.

In the light of the special circumstances and considerations above reviewed, it is submitted that the Trial Court erred in finding that the Edgar contracts "threatened the Institute project only in so far as the Institute was concerned with uniformity of price structure", that "Defendants' purpose in obtaining the agreement from Edgar was to preserve that structure" (Finding 153, R. 301) and that defendants' action in this respect "constituted undue and unreasonable restraint of trade" (Finding 155, R. 301).

3. *Contract Enforcement.*

Payment for sugar does not become due until after delivery to the buyer, and therefore the failure of a refiner to require the buyer to take delivery within the period specified in the contract results in an indefinite extension of credit to favored customers. The practice also results in the assumption by the refiner of all storage and carrying charges that the customer would otherwise have to assume (R. 988-9).

Prior to the formation of the Institute, failure to enforce the contract provision requiring withdrawal of sugar at the expiration of the thirty day contract period was one of the various forms of granting a concession to particular customers. As testified by Lowry:

> "* * * That did not appear in the contract but it would be part of the arrangement and was carried out. Overrunning was a matter of individual cases. Some buyers might receive the indulgence while others might not. It could be used as an instrumentality for discrimination and favoritism between purchasers" (R. 383).

Campiglia testified that C. & H., after the formation of the Institute:

> "* * * expected the members to adhere to their principle of openly announced prices and terms. I thought that on an announced sale for a period of 30, 40 or 60 days, delivery should be made in accordance with that announcement. We protested against instances, which we found from time to time in the trade, of extending deliveries and insisted that members should adhere to terms which they had announced. It was probably one of the duties of the Enforcement Committee to see that contracts were enforced. * * * The Institute collected statistics in connection with deliveries, showing the quantity undelivered at the end of the contract period and circulated that information to its members" (R. 715-16).

As stated in the Opinion of the Trial Court (R. 179):

> "It was at times impracticable to enforce to the letter the usual 30 day contract. Extensions were often granted. The Enforcement Committee during the year in which it made recommendations as to the extensions which should be granted was guided in part at least by the periodic statistics of the customers' position on their contracts."

It is submitted that concerted efforts on the part of the refiners to secure uniform compliance with the openly announced terms and provisions of their contracts, so as to avoid the use of the extension privilege for secret and unfair discriminations among customers, were entirely proper and lawful, as a necessary application of the Institute's basic principle.

And we further submit that it was an obviously reasonable application of that principle to relax the ordinary practice of contract enforcement in periods when general trade conditions made such relaxation reasonable, and to provide for common action in such periods, so that refiners would not use the contract extensions for discriminatory purposes. We think, therefore, that the Trial Court erred in holding that

> "Defendants were without justification in acting concertedly to determine whether and to what extent to relax the rigid enforcement of the 30-day contract" (Finding 154, R. 301).

(f) The Four Payment Plan, Split Billing, the Cash Discount, the Price Guarantee and Second Hand Sugar or Resales.

These subjects are reviewed by the Trial Court in Findings of Fact 172 to 186 and 193 to 196 inclusive (R. 304-307, 309). With the single exception noted in the following paragraph, appellants have determined that it is unnecessary to ask this Court to review their Assignments of Error 84 to 87 and 94 to 95, inclusive, with respect thereto (R. 342-3, 344-5). The subjects involved are of slight importance in comparison with the major issues in the case. In each instance, issues of fact alone are raised,

the determination of which would involve a detailed and lengthy review of the evidence. Since the only action enjoined by the Decree with respect to these subjects is action which the appellants deny having undertaken in the past and which they have no desire to undertake in the future, no useful purpose would be served by a decision of this Court that these provisions of the Decree are unwarranted by the evidence.

In Finding of Fact 195 (R. 309), the Trial Court states that defendants concertedly adopted rules:

> "* * * requiring buyers to elect and specify at the time of entering contract, without privilege of change, the prices and/or terms in cases where the refiner had more than one price or different terms in different or the same territories."

In Finding of Fact 196 (R. 309), the Court states that no justification is found "for the restraints * * * upon the freedom to vary prices and terms where the refiner had differing prices and terms" and that "in these respects defendants imposed undue and unreasonable restraints of trade". Paragraph 44 of the Decree (R. 325) enjoins defendants from concertedly

> "Requiring buyers to elect between the guarantee and non-guarantee form of contract at the time of entering the contract or at any other time before delivery or refusing to grant buyers the privilege of changing from one destination to another by resale or otherwise."

It is submitted that this Finding of an undue and unreasonable restraint of trade and the provision of the Decree above quoted are erroneous and should be reversed (A. of E. 95, 129 (37), R. 345, 353).

Where a refiner openly offers two different types of contract applicable to two different territories, and involving different prices and terms, a requirement that the buyer elect, at the time the contract is entered into, between the two types of contract offered, is an obvious and necessary corollary of the principle of open prices and terms, with no discrimination between customers. Inasmuch as guarantee contracts are offered by refiners only in a limited territory (R. 714), the subsequent delivery in non-guarantee territory of sugar originally booked under a guarantee contract would constitute a flagrant violation of the refiner's own open announcements. A buyer in a territory where a price guaranty was not offered could order his requirements under a guarantee contract *for shipment into guarantee territory where he did not do business,* and then, if there was no price decline, request the refiner to alter the terms of the contract and make delivery at the buyers' place of business in non-guarantee territory, thereby obtaining by means of a subterfuge, the benefit of a guaranty which the refiner did not openly announce in the territory where the buyer ultimately demanded delivery. The subsequent granting of these valuable options to some customers and the withholding of them from other customers would have been a grossly unfair discrimination, and the only way for the refiners to close this door to such unfair practices was to require that the election as to the form of contract be made when the contract was entered. No form of public announcement, and no other method of handling this special situation, could have been devised to prevent the use of this option for discriminatory purposes.

(g) Transportation Activities.

1. *Transiting and Diversion.*

Transiting (sometimes called retransiting or storage in transit) is the exercise of the right granted under the provisions of a carrier's tariff to stop and store a shipment at an intermediate point and subsequently forward it to a point beyond, and to apply the through rate from point of origin to ultimate destination, via the storage point, instead of the higher combination of local rates to and from the storage point. The tariffs of the carriers determine the points at which shipments may be stored in transit, called transit points, and contain the rules governing the exercise of the privilege (R. 573-4, Ex. 264).

Diversion (sometimes called reconsignment) is the right generally granted to shippers by railroad's tariffs to change the destination or consignee of a shipment while the goods are in transit and to apply the through rate from the point of origin to the ultimate destination via the point of diversion, instead of the higher combination of local rates to and from the diversion point (R. 739).

The use by others of the transiting and diversion privileges either before or since the Institute has been of concern to the refiners only where the shipments were made by the refiners themselves (R. 748) and then only in two respects —(1) in so far as they might be used to defeat the refiners' publicly announced freight applications (R. 749), and (2) to the extent that the refiners might be involved in possible claims of violations of the Interstate Commerce Act, through the use of the transit privilege contrary to the provisions of the transit tariffs (R. 749-50).

Except where one of these two situations has arisen, the refiners have taken no action to restrict or interfere in

any way with the transiting or diversion of sugar. Thus a purchaser of sugar f.o.b. refinery or elsewhere could always transit or divert his own shipments as he pleased and refiners have never concerned themselves with his actions. Moreover, even on a refiner's own shipment, if the purchaser was willing to pay the openly announced freight application at ultimate destination and no railroad tariff was being violated, the refiner actually assisted such purchaser in diverting or in transiting, by registering inbound billing and endorsing the privilege over to the purchaser (R. 754, 810, Ex. T-4).

Wherever a refiner's freight absorption under its openly announced application is greater at one point than at another, whether because the freight application is artificially depressed (as where determined by a differential rate) or because of the railroad rate structure itself, the possibility arises of a buyer utilizing the first point as the *ostensible* destination and then transiting or diverting the shipment to the other point. The sole purpose and only possible effect is to extend the refiner's higher freight absorption to the latter point (R. 810, 747).

The manner in which unscrupulous buyers fraudulently contrived to obtain delivery of sugar at less than the refiners' openly announced freight application at the point of ultimate destination and caused the refiner to absorb more of the freight charge than the refiner had announced he would absorb at that point is clearly appreciated and described by the Trial Court.

> "Because of the artificiality in the freight applications charged by the several refiners both before and increasingly since the Institute, there were opportunities for using transiting and diversion priv-

ileges to get sugar to ultimate destination at a cost to the purchaser below that of the announced freight application of the refiner. Thus, prior to the Institute, a blanket freight rate of 84c from the Pacific coast covering the entire territory from the Rocky Mountains east to Chicago and St. Louis was in force and in the western part of this territory, too remote for eastern and southern seaboard refiners to compete, it was the actual rate charged the purchasers. But at points further east, at which the tariff rates from the eastern and southern seaboard were less than from the Pacific Coast, the California refiners, in order to compete had to absorb part of the freight by making freight applications lower than 84c. Sugar bought from California refiners for delivery at more easterly points on the lower freight application might then be diverted to a more westerly point; refiners' higher application for that point would, thus, be defeated. Texas offers another illustration. Prior to 1928, blanket freight rates were in effect at Texas points both from New Orleans and from the Texas refining points; the Texas refiners always charged the New Orleans rate which then was 17c higher and refused to sell f.o.b. refinery. In 1928, Texas was put on a mileage and New Orleans on a zone basis. Dallas and Hearne, being in the same zone, bore the same tariff rate, 58c from New Orleans; but from Sugarland, Texas, Hearne was 28c and Dallas 38c. The refiners' freight application from either New Orleans or Sugarland to Hearne was 45c, to Dallas 55c, in each case, the Sugarland tariff rate plus 17c. On an order placed with the New Orleans refiner for shipment to Hearne, Texas, the refiner would prepay the actual freight at the rate of 58c, billing the customer for the freight application of 45c; the re-

finer thereby absorbed 13c. If, before the car reached Hearne the customer diverted it, or from Hearne transited it to Dallas, there were no additional freight charges. Thus, the buyer had the sugar in Dallas at a transportation cost of 45c instead of the refiners' freight application of 55c to his Dallas competitor.

"*The evidence shows that both before and since the Institute, diversion and transiting have been used by customers to defeat freight applications* either by *misrepresenting* to the refiners the actual destination and then transiting or diverting the sugar, in effect *practicing a fraud* upon the refiner, or with the refiners' consent, either secretly as a screen for a secret concession, or openly" (R. 160-61). (Italics ours.)

It should be pointed out, however, that the statement of the Trial Court that opportunities for practicing transiting and diversion to defeat the announced freight application of the refiner existed because of "the *artificiality* of the freight applications charged by the several refiners" is misleading. There were two classes of cases in which transiting and diversion were practiced to defeat the announced freight applications of the refiners. One class, and by far the larger class, was that illustrated by the Court's first example, stated above (p. 184), where the Pacific Coast refiners were paying the railroads the 84c blanket rate from San Francisco to the entire area from the Rocky Mountains to the Mississippi, but were absorbing a large part of that freight payment by quoting to their customers in that area a much lower rate. This lower rate, which was the one the Pacific Coast refiners actually charged to their customers at any given point in the territory, was the same

as the lowest rate charged by the New Orleans refiners to their customers for shipments to such point. Since the New Orleans refiners were the nearest freight-wise to such point and thus enjoyed the lowest actual rates, the rates they charged were the actual rates they paid the railroads or the barge lines by which they shipped to such point. The Pacific Coast refiners, therefore, in order to compete with the New Orleans refiners at such point, were meeting that actual rate paid by the New Orleans refiners. That rate was, of course, in no sense artificial so far as the New Orleans refiners were concerned, and it was artificial so far as the San Francisco refiners were concerned only in the sense that it was *less* than the rate they were actually paying to the railroads on the sugar they shipped to this competitive area. In order to compete there against this actual rate of the New Orleans refiners, the San Francisco refiners had to charge their customers the New Orleans actual rate, and absorb the difference between that rate and the rate they themselves had paid the railroads.

The other case used by the Court in this illustration, the Hearne and Dallas situation, involved an actual freight "pick-up" enjoyed by the Texas refiners on their shipments into a limited area in northern Texas. These two Texas refiners elected not to take full advantage of their lower actual railroad freight rates into this northern Texas territory by selling there on the actual freight rates, and thus compelling their competitors in New Orleans and elsewhere who wanted to ship into that territory to absorb the difference between the Texas refiners' actual rate and the competitors' larger rates from their more distant refineries.

But that situation had *always* existed since long before the Institute was organized, and it was in no way essentially related to or typical of the transiting and diversion problem with which we are here concerned. It represented only a small part of that problem.

The freight applications of the refiners which gave rise to this problem of transiting and diversion were artificial only in the sense that they were *always* less than the actual rates charged by the carriers to the more distant refiners who were competing in a given area, and they thus represented a freight loss by such refiners. The extent to which they were less than the actual freight rate, *i.e.*, the amount of the more distant refiners' absorption, was determined entirely by the actual railroad rate structure and the competitive freight applications quoted by the refiners enjoying the lowest actual freight rates into the competitive territory, as clearly evidenced by the very examples cited by the Trial Court.

The Court has made the following specific Findings with respect to this subject:

> "Both before and since the Institute, diversion and transiting have been used by customers to defeat freight applications either by misrepresenting to the refiners the actual destination and then transiting or diverting the sugar, in effect practicing a fraud upon the refiner, or with the refiner's consent, either secretly as a screen for secret concession or openly (Finding 121, R. 294).

"Defendants adopted Code interpretations which contained detailed recommendations with respect to the action that individual refiners should take in making certain that no transiting (or) diversion defeated the refiners' freight applications. While these recommendations, based on the collective experience of the industry, may have represented *the most effective means for discovering frauds,* they were designed to prevent and defendants agreed to prevent any transiting and diversion by customers even openly, when they would defeat freight applications. Defendants' agreement in this respect and actions pursuant thereto were essential to the success of their concerted efforts since the Institute to maintain artificial freight rate structures; they were for the purpose of aiding in maintaining such structures and constituted undue and unreasonable restraint of trade" (Finding 122, R. 294).

The reasoning of the Trial Court in the passages above quoted is confused. The Court correctly finds that transiting and diversion were used by customers *to defeat refiners' freight applications,* i.e. to force the refiner to absorb more freight than intended under the refiner's open announcements. The Court correctly states that if this was done without the knowledge or consent of the refiner, a deliberate fraud was perpetrated on the refiner. The Court correctly finds that if it was done with the refiner's consent and secretly, the device amounted to the granting of a secret concession. The Court then intimates that if done openly with the refiner's consent, the practice was entirely proper. Therein lies the fallacy. *There is no purpose in transiting or diversion except to defeat a refiner's announced application at a given point.* Hence the Court's concept of a re-

finer *openly authorizing* the devious device of transiting or diversion *to defeat his openly announced application* is entirely unreal. If he "openly authorized" transiting and diversion by all customers to defeat his announced application at a certain point, as the Court's ruling contemplates, he would in effect be announcing that his announced application was meaningless. *No Institute recommendation or regulation would have been violated if any refiner had chosen to make such an absurd announcement.* But, of course, no refiner could have made it without making himself appear ridiculous in the eyes of the trade. If he wanted to accomplish the practical result that would come from such an announcement, he would simply withdraw his previously announced application and announce a new and lower one, equivalent to the rate that would be realized by the transiting or diversion. *The Institute took no action whatsoever to prevent any refiner from lowering his publicly announced freight application at any point.*

"The artificial freight rate structure" to which the Court refers was the direct result of the competitive contests whereby the more distant refiners invaded the home territory of other refiners. They accomplished this by "absorbing" freight on shipments into that territory. This practice of freight absorptions increased greatly during the Institute period and was direct and incontrovertible evidence of the promotion of real economic competition under Institute conditions. The situation differed from that prior to the Institute only in the intensity of the *public* competition between the refiners in these freight absorptions, which were the means whereby they accomplished additional extensions of their selling territory. Prior to the Institute, this competition had been largely furtive and secret, taking the form of increased freight absorptions *for favored custo-*

mers, either by direct secret freight rebates, or by *secretly authorized* transiting and diversion, or by both. After the Institute was organized and these secret discriminatory arrangements were abolished, the refiners had to absorb freight *for all customers alike* in the invaded territories. The total *net loss* of the industry in these competitive freight absorptions has therefore steadily increased every year since the organization of the Institute, as will be seen from Exhibit F-17, printed in the Appendix. In 1927, the net freight absorptions of the industry as a whole were $2,974,568, and by 1931 they had increased to $3,974,674.

The freight rate structure produced by these absorptions was no more "artificial" in its nature during the Institute period than before. In reality, it was less artificial, because before the Institute it had the additional artificiality of the secret discriminations which made the announced freight applications completely unreal for many of the buyers, highly misleading to all the others and also to the refiner's competitors.

2. *Water Carriers.*

With respect to this subject the Trial Court has found (Finding 125, R. 295) that "defendants concertedly sought and in the spring of 1930 obtained from transportation companies operating on the New York State Barge Canal, an agreement that they would carry sugar only on the basis of openly announced rates and terms from which they would not deviate without open announcement", that "an important purpose of the defendants in seeking these agreements was to effect a stabilization of transportation rates", and that "defendants' conduct in this respect constituted undue and unreasonable restraint of trade".

In the spring of 1930 there had been a recurrence of rumors of rebating by certain operators on the New York

State Barge Canal (R. 755). According to these rumors, some portion of the transportation charges paid by refiners was being secretly passed on to customers with resulting discriminations. These carriers were not subject to the supervision of the Interstate Commerce Commission or any other regulatory authority (R. 566, 755). To meet the situation the following Code Interpretations were adopted (Ex. 20, Sec. XII, par. 1 (a) and (b)):

> "1. WATER TRANSPORTATION
>
> "(a) The Institute recommends to its members that they refrain from the employment of water transportation companies which do not publicly announce the rates, terms, and conditions under which they transport sugars.
>
> "(b) The Institute recommends to its members that they cease to employ any water transportation company which, after openly announcing rates, terms and conditions, performs any additional service beyond that provided for in its announcement or makes any rebate of any kind or character whatsoever, or otherwise fails to abide by the provisions of its open announcement."

The purpose of these Code Interpretations was merely to insure that the refiner's own transportation payments would not be used for secret rebates. This was likewise the purpose of the meeting with the water carriers held on March 7, 1930. Government witness Muller, manager of one of the New York Barge Canal lines, testified:

> "At the Institute meeting attended by the canal carriers Taylor and Ripley said that they wanted re-

> bating cut out. They did not say they wanted each canal operator to charge the same rate. They said they wanted each operator to decide what rates and service he was going to give and then file with the refiners with whom he wanted to do business a statement of those rates and conditions, and, having so filed them, to adhere until he desired to change, whereupon he should give a like notice. There was no inference that the various operators had to have the same rates and conditions" (R. 566).

See also the testimony of Ripley to the same effect (R. 755-6). The purpose of the meeting clearly was identical with that of the two Code Interpretations, *i.e.*, to insure that "transportation would be only on rates openly and publicly announced" and to eliminate secret rebating (Ex. 316).

The refiners' efforts to prevent secret rebating by water carriers out of the transportation charges which the refiners themselves paid were directly in line with the public policy enacted in the Interstate Commerce Act. It was just such practices which led to that Act when it became evident that their inevitable result was to destroy, not to foster competition. The effort of defendants was not to "stabilize" transportation rates in any improper sense of the term. It is submitted that the efforts of the refiners here condemned by the Trial Court as an "undue and unreasonable restraint of trade" were both lawful and proper. Their purpose and effect were to avoid discrimination among customers by means of secret concessions out of the freight charges paid by the refiners.

3. *Private Charters.*

With respect to this subject the Trial Court made the following Finding:

> "Recommendations of the Institute concertedly observed by the members provided that none of them should ship sugar on his own account by private charter except when such charter was arranged directly between refiner and carrier and refiner was satisfied that no broker, buyer or warehouseman was participating in the rate, and that members should submit the terms of every such private charter to the Executive Secretary, so that he might scrutinize it for any indications of rebate or other violation of the Code of Ethics.
>
> "These recommendations went further than was necessary to accomplish the end of preventing secret rebating; the real aim was to assist in the preservation of the price structure. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade" (Finding 126, R. 295).

These Findings are not elaborated in the Opinion of the Trial Court. No indication is given with respect to the basis for the Court's conclusion that the recommendations described went further than necessary to prevent secret rebating. As far as can be ascertained from examination of the Record there is no logical or factual basis for the Court's bare *suspicion* that the refiners' "real aim was to assist in the preservation of the price structure" or for the unexplained and, it is submitted, wholly unwarranted conclusion that these recommendations constituted "undue and unreasonable restraint of trade".

4. *Pool Cars and Pool Cargoes.*

With respect to this subject the Trial Court has found:

> "Minimum cargo was often as high as 2,000 bags and minimum carload usually 600 bags. Customers, unable to purchase in such large quantities, could, by clubbing together, obtain cargo or carload rates. Acting under Institute recommendations, defendants agreed to refuse and concertedly refused to aid customers in making up the required minima by *themselves* participating in such pools with sugar shipped on their own account. Defendants' purpose was not, as claimed, to eliminate discrimination. Even if, due to refining schedules and sales requirements, refiners could not grant this privilege to all customers, there is nothing unfair in an apparent discrimination which results solely from the necessary limitations of a refiner's capacity in this respect. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade" (Finding 127, R. 296).

Clearly, it would have been wholly impossible as a practical matter for a refiner to supply in all cases the balance required by a customer or customers to make up a minimum cargo or carload for shipment by privately chartered vessel or by rail. It would have meant shipments by refiners of varying quantities of sugar to all parts of the country where the refiner had no reason whatsoever to dump such odd lots. In some cases the refiner could be called upon to ship merely a few bags necessary to complete a minimum cargo or carload and in other cases might be called upon to supply the bulk of the shipment. It was a service which by its very nature could not possibly have been made available

to all of a refiner's customers or to any substantial number of customers. To participate with particular customers in such shipments on the infrequent occasions when the shipment happened to coincide with the refiner's own requirements would have given such customers a wholly unfair advantage over those other customers with whom it was impossible for the refiner similarly to cooperate.

It is submitted that the conclusion of the Trial Court that the purpose of defendants in observing the Institute recommendation above referred to "was not, as claimed, to eliminate discrimination" amounts to nothing more than an unfounded suspicion, unwarranted by the evidence. It is submitted that the refusal of refiners to grant to particular customers a special service, impossible to be offered openly to all customers without discrimination, does not constitute "undue and unreasonable restraint of trade" and is clearly justifiable as a specific application of the basic principle adopted by the refiners in the formation of the Institute. If this action had not been taken, a ready means of secret discrimination between customers would have been available. By participating with favored customers in making up pool cars and cargoes a refiner could have granted such customers a valuable rebate, withheld from other customers, and not in any way discoverable by other refiners or customers (R. 782-4).

5. *Trucking.*

With respect to this subject the Trial Court has found:

> "Defendants agreed to use only trucking concerns not affiliated with any buyer, broker, or warehouse and then only under non-rebating contracts.

> Even though a warehouse trucking for its own customers may have been excepted from the operation of the agreement, the alleged justifications for the general policy and acts pursuant thereto, similar to those offered as to brokers and warehouses, are equally without merit. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade" (Finding 129, R. 296).

The Finding above quoted involves the same questions as those previously considered at length in connection with the subject of affiliated brokers and warehouses, and the refiners' efforts to guard against secret rebating by water carriers not subject to the supervision of the Interstate Commerce Commission.

The splitting with a customer by a trucking concern of transportation charges paid by the refiner not only violates the public policy embodied in the Interstate Commerce Act, but results in a discrimination among customers in complete violation of the basic principle adopted by the refiners.

The refiners' refusal to employ trucking concerns affiliated with brokers, warehousemen or buyers is clearly justifiable in view of the inconsistent nature of the functions involved. It was part of the broker's function to select transportation means and routes for shipment. It was the duty of the broker to select the best means, the quickest routes and the cheapest rates, and of course the refiner was deprived of the broker's disinterested service if the broker himself was engaged in the transportation business (R. 893, 835, 901).

Obviously there is a temptation to the broker to use facilities in which he is interested and to charge the refiner a price above that for which the service could otherwise be obtained or to give the business to some company which

paid the broker a commission or gave him a split on the transportation charges. The functions of truckman and warehouseman are equally inconsistent since the refiner relies on each to check the other. Both truckman and warehouseman are required to advise the refiner of the date when sugars arrive at or are shipped from the warehouse. If both functions are combined, this check on bills for storage charges is lost (R. 835). Similarly, where the broker himself acts as truckman, the refiner is deprived of the safeguard of a disinterested agent's report of delivery dates (R. 835). Accurate delivery date reports are an absolute necessity if secret concessions are to be prevented. By shifting reports of delivery dates backward or forward for a day or two a broker can often give a refiner's customer an effective rebate of ten or fifteen cents a bag, because of an intervening rise or fall in the price.

This combination of inconsistent functions provided the same facilities for extending secret and undetectable rebates to favored customers that were provided by the broker-warehouseman, broker-customer, and warehouseman-customer combinations discussed earlier in this brief. It is submitted that the Finding of the Court that defendants' action in this connection "constituted undue and unreasonable restraint of trade" is therefore erroneous.

(h) Institute Investigations.

The Trial Court found that:

> "The Institute from time to time examined the several refiners' records and files in investigating suspected code violations and held more or less formal trials of refiners in order to determine whether there had been code violations. These activities, insofar as they were in and of defendants other illegal activities, are likewise undue and unreasonable restraint of trade" (Finding 209, R. 312).

Paragraph 45 of the Decree enjoins defendants from concertedly

> "Engaging in any policing activities or investigating or maintaining any system of investigation, or examining files, records or stocks, or holding any trials, to ascertain or prevent violations of or departure from any program enjoined by this decree" (R. 325).

For the reasons specified throughout the balance of this brief, Appellants deny that the Code provisions and the action taken thereunder were illegal, as found by the Trial Court. In so far as this Court may sustain the legality of those provisions and the action taken thereunder, the investigations undertaken by the Institute for the purpose of ascertaining and preventing violation of such provisions are clearly justifiable and the Findings and Decree of the Trial Court in this respect should therefore be reversed.

IV.

INSTITUTE ACTIVITIES DESIGNED TO EFFECT MORE ECONOMIC METHODS OF PRODUCTION AND DISTRIBUTION.

A. The Institute's Statistical Service.

Although the only vice which the Trial Court found in respect of the Institute's statistical service was the failure to disseminate among the entire trade *all* statistics collected by the Institute, it is desirable to review briefly the manner in which the Institute operated as a statistical organization, in order that this Court may understand the basis, or lack of basis, for the Trial Court's Finding.

Price Announcements. The matter of *price announcements* has already been discussed in detail. Here the Institute functioned to give prompt and accurate publicity *throughout the trade* to the terms of the announcements, thereby benefiting not only refiner sellers but also brokers and buyers everywhere. Members notified the Institute promptly of the exact terms of every price or terms announcement which they released. The Institute relayed this information at once, by wire or messenger, *in the exact wording received,* to all its members (except C. & H.), to the "ticker" service (Dow Jones & Co.), to the Wall Street News, to various brokerage houses, to certain producers of raw and foreign refined sugar and to the Domestic Sugar Bureau (R. 633, Ex. I-2). The purpose of this system was to provide as rapidly as possible an *accurate* copy of the terms of price announcements, accuracy being doubly im-

portant because of the complicated form of such announcements (R. 637). The Institute's facilities were put at the disposal of every part of the trade—buyers (through news agencies and through brokers), beet sugar producers and sellers, brokers, raw sugar producers and the refiners themselves.

Freight Announcements. The system of giving publicity to price announcements was also employed with some modification in connection with announcements of freight applications, grade and package differentials and the like. The subject matter here involved, however, was frequently essentially local in character, of restricted interest, and the number and length of the announcements were considerably greater than in the case of price announcements. Unless considered of particular importance, therefore, these announcements were sent by mail rather than by wire or by messenger (R. 777). Because of their essentially local character and their restricted interest they were not ordinarily sent to the news agencies (R. 778). In addition to members, however, they were given to brokerage houses, to the Domestic Sugar Bureau and to anyone in the trade who made inquiry (R. 778, Ex. I-2).

The information collected and disseminated as above described would have been available to the trade even without the Institute, but not in such accurate and reliable form (R. 637). However, the balance of the statistical information compiled by the Institute could not have been obtained *through any other source* (R. 592, 710, 1035, 1060).

Melt, Deliveries and Stocks. Members reported each week their total melt for the week, total deliveries for the week and total stocks on hand. This information was tabulated and reported back to the members (R. 981). *Figures*

showing total melt and total deliveries were released weekly and widely distributed by the Institute in the trade and elsewhere (R. 983). The organizations and persons receiving these figures included the Journal of Commerce, Facts About Sugar, Magazine of Wall Street, New York Coffee & Sugar Exchange, Willett & Gray (the major statistical sugar trade journal), and many brokers, sugar statisticians and investment bankers (Ex. T-7). This information was available to anyone desiring it.

Deliveries by States. The number of bags of sugar delivered in each state was reported to the Institute—weekly by members and monthly by the Domestic Sugar Bureau (for the beet producers) and by the importers of refined sugar (R. 983). This information was tabulated by the Institute and the total number of bags delivered in each state reported back weekly and monthly to all members (R. 983). The total deliveries of all sugar, divided to show the amount of domestic cane, imported cane and domestic beet delivered in the period, was reported monthly to members and *to the trade generally* (R. 984) through distribution to the publications, news agencies, brokers, etc., comprising the "trade list" (Ex. T-7).

Miscellaneous Statistics. In addition, the Institute compiled and distributed to members and importers weekly statistics as to the amount of sugar on consignment by states, the amount of sugar stored in transit by states and the amount of sugar moved by eastern and southern differential routes for refiners' account and for customers' account (R. 984-5).

The Trial Court expressly found that there were widely distributed to the purchasing trade through news agencies, banks and brokers,

> "* * * weekly statistics as to the total melt and total deliveries and monthly statistics of the total deliveries of all sugar, divided so as to show the amount of domestic cane, imported cane, and beet sugar delivered through the period" (Finding 60, R. 280).

The good faith of the refiners in the dissemination of these statistics to the purchasing trade is evidenced by the further fact, as found by the Court, that

> "* * * The total refined stocks on hand could be computed by subtracting from the total melt of each week the total deliveries during each week, and defendants, during recent years when refined stocks were greatly increasing, *continued to supply to the trade, weekly statistics on melt and deliveries, from which the trade could readily calculate such increase*" (Finding 61, R. 280).

It need scarcely be pointed out that, were price maintenance the dominant purpose of defendants as found by the Trial Court, defendants would not have given to the buying trade, as the Court found they did, this information which kept the trade constantly informed of all increases in refined stocks on hand, which could not have any other than a depressing effect upon refined prices.

Yet with respect to these very statistics, of certain value to the purchasing trade and not available through any source other than the Institute, the Court states that

> "The statistics relating to total production, total deliveries, and calculable stocks, which defendants made available to the purchasing trade, could have had only limited significance for the individual purchaser, and were even likely to mislead him" (Finding 65, R. 280).

Neither the Findings of Fact nor the Opinion of the Court afford any clue as to why, how or in what manner the trade could possibly have been misled by clearly defined and wholly unambiguous statistics.

The Court's Charge of Withholding Statistics.

The Court charges the defendants with having obtained an unfair advantage with respect to purchasers (Finding 65, R. 280) and with having unduly and unreasonably restrained trade (Finding 66, R. 281) by failing to disseminate among the purchasing trade the statistics compiled by the Institute and submitted weekly to its members showing:

(a) Production and deliveries of the individual refiners;

(b) Total deliveries by states;

(c) Total consigned and in-transit stocks by states; and

(d) Total deliveries by differential routes by states.

Statistical information of this type, while of great importance to the individual refiners, *was of no value whatsoever to the purchasing trade,* and the Trial Court makes no attempt to point out *how the buyers were prejudiced by their failure to receive such information, or the use to which such information could have been put had it been broadcast to the entire purchasing trade.*

The refiners themselves, however, were keenly interested in such statistics because they enabled them to determine whether they were preserving their position in the industry in comparison with that of their individual com-

petitors. With these points in mind, let us consider each item of these allegedly "withheld" statistics referred to by the Trial Court.

(a) *Production and Deliveries of Individual Refiners.* McCahan, for example, would be anxious to know not only how its production and deliveries compared with the total production and deliveries of all refiners, but more particularly whether its volume had increased or decreased in comparison with that of Pennsylvania and other individual refiners who were McCahan's principal competitors in the territories where it operated. McCahan's comparison of its own production and delivery figures with those for the industry *as a whole* might indicate a loss in its relative position without disclosing the reason therefor. But, with the figures for the *individual* refiners available, McCahan might discover that the relative loss resulted solely from a substantial increase in the volume of the two Pacific Coast refiners with whom McCahan had no substantial direct competition. On the other hand, knowledge by McCahan that its relative loss of position resulted from increased business of Pennsylvania or other immediate competitors would be a cause for alarm and indicate the need of more vigorous selling efforts against the refiner who was cutting into McCahan's business.

But this type of information could not have been of the slightest practical use to any buyer. It might have satisfied an occasional vague curiosity, but nothing more.

(b) *Total Weekly Deliveries by States.* The statistics showing the total number of bags delivered by all refiners weekly in *each state* were of real value to the refiners, since

a decrease in a refiner's relative share of the total business in any given state would point to the necessity of more intensive sales efforts in that particular area. Here again, however, such information could have had no practical value to the *buyers*. The weekly deliveries in any given state or group of states, have no bearing at all on sugar prices, or on the trade factors which might influence such prices in the future. From the *buyer's* standpoint, an increase or decrease in the weekly deliveries in a given state or group of states would merely reflect the usual seasonal rise and fall in sugar sales, a fact which was already fully known to him.

The buyers were already supplied by the trade publications and the refiners with the only information bearing on sugar prices which could be of use to them, namely, *raw sugar prices* and *the total weekly melt and the total weekly deliveries of all sugar, divided so as to show the amounts of domestic cane, imported cane and domestic beet.* From this information, as the Court found (R. 280), the buyers could readily calculate the total refined stocks on hand, and this was the only remaining information useful to them in gauging probable future refiners' prices.

It is theoretically possible that information to the buyers as to weekly deliveries in their own states might have been useful in their competition with other distributors. They might thus get some possible light in determining whether to cut their own prices or not to cut them, on the theory that deliveries in their state were increasing or decreasing so as to indicate an increase or decrease of stock in the hands of local distributors. Even such a use is exceedingly doubtful as a practical matter, but it is the only possible use

we can imagine buyers might have for this information of weekly deliveries of refiners by states.

Some such vaguely possible use must have been the source of the Court's confusion on this point. But it is readily apparent that such a use could have had no bearing on *refiners'* prices. The fact that there might be a slight tendency to an increase or decrease of weekly deliveries in Indiana or Texas or Vermont sheds no light at all on probable refined prices. The refiners could get no possible advantage over the buyers by having such information themselves and withholding it from the buyers. And certainly the mere fact that the refiners collected such information for a proper purpose, because it was useful to them in determining whether they were individually gaining or losing in their competitive contests with each other, placed them under no legal or other obligation to disseminate it among the buyers. The vaguely possible value of such information to the buyers in determining their own policies as to wholesale and retail prices might have provided some reason for action by themselves to collect and disseminate it, but apparently none of them ever thought of it, *because there is no evidence that any of them ever asked for such information or thought it would be useful.*

(c) *Total Consigned and In-Transit Stock by States.*

(d) *Total Deliveries by Differential Routes by States.*

Here again the record is bare of any shred of evidence to support the Court's Finding. *No witness testified that any buyers ever sought information as to consigned and in-transit stock by states or total deliveries by differential*

routes by states, or that any buyer ever thought such information would be of any use to him. The reason there is no such evidence is apparent. Refiners were interested in such information because it was helpful in determining their shipping practices and in enabling them to avoid the useless expense and waste involved in accumulating excess consignment stocks in the various states. But the *buyers* were no more interested in this type of information than in total *deliveries* by states. Since refiners' prices are determined by national and not by local factors, and since sugar is always available on a few minutes' or at most a few hours' notice, the buyers had no interest *contra* the refiners in knowing the facts in question here, and, so far as the record shows, they were of no interest even as between the buyers themselves.

Here again, it is theoretically possible that a buyer might use such information in trying to prognosticate a possible change in the refiners' freight applications, though practically that is extremely doubtful. Certainly the refiners did not "withhold" this information from the buyers because they did not want the buyers to have it. The sole reason it was not published was because the refiners had no reason to believe that the buyers wanted it.

We submit that in the light of the realities, this Finding of the Trial Court is astonishing. The action of the refiners in collecting and giving freely to the trade information of the greatest practical value to all distributors, and not otherwise available to them, is practically ignored, and they are condemned for withholding from the trade other information which apparently no one in the trade ever imagined could be of the slightest use to him.

The policy of the Sherman Act as announced by the Supreme Court in the *Maple Flooring* and *Cement* cases not only permits trade associations to supply the need for statistics testified to by the defendants, but stamps the practice with approval as a progressive and forward-looking enterprise. The Court there approved the "systematic reporting between competitors" of much more "intimate details of each other's business" than any of those reported by the defendant refiners. The defendants, therefore, point to their activities in this connection as demonstrating the beneficial effects of the Institute on the sugar industry generally.

This part of our discussion can be concluded in no better fashion than by quoting the words of this Court in the *Maple Flooring* case (*Maple Flooring Association* v. *U. S.*, 268 U. S. 563, 583):

> "It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated. Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry; who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more

general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information."

B. Consignment Points.

Appellants freely conceded throughout the trial and still concede that reduction of consignment points was a matter in which they acted concertedly, in the sense that all recommendations of the Institute as to consignment points were made only by unanimous consent of the members. The evidence shows, however, that at no time was there any obligation on the part of anyone to agree to any consignment point program, or, once accepted, not to depart therefrom at any time, and that members not only freely refused to adopt proposed recommendations but frequently departed from those already made, consigning stocks at numerous points not recommended by the Institute.

Appellants contend that it was an entirely proper and legitimate function of the Institute to recommend, and for the members concertedly to proceed with, the reduction in the number of consignment points throughout the country, because the tremendous expenditure required for the maintenance of an excessive number of consignment points, which the entire consuming public ultimately had to pay, resulted in no real advantage either to refiners or to buyers and therefore represented sheer economic waste.

Situation Prior to 1928.

Prior to 1925, the refiners maintained consigned stocks at a few strategic points, either in the consuming area to be served or intermediate between such area and the refin-

ery. The points selected were important terminal or junction points from which transshipment would ordinarily be made, or markets from which sugar could be supplied to a large surrounding territory. The consignment point was regarded as *a center from which to distribute to a surrounding area, rather than as a local means of supply,* although once the sugar was stored there, it was also available for local distribution in carload and less than carload lots. The purpose was to give prompt service to substantial tributary areas, and not to carry the local jobber's sugar for him (R. 811, 927).

Consignment stocks, however, were carried to excess during 1925, 1926 and 1927. A refiner would put a stock in a smaller city or town, so that he could go to the local trade with the two sales arguments of faster service and reduced customer investment. Although, as hereafter shown, such a stock was unnecessary from a service standpoint and resulted in no savings to customers, these sales arguments gave the refiner with the stock enough of an advantage over competing refiners so that they usually had to follow and establish their own consigned stocks. This removed the very slight competitive advantage which the first refiner had obtained by putting in his stock (R. 927, 812, 618-9).

The inauguration of uneconomic and unnecessary consignment points increased rapidly and by the end of 1927, when the Institute was formed, constituted one of the outstanding evils of the industry (R. 593). For example, C. & H.'s consignment points increased from about twelve in 1925 to around a hundred in 1927 (R. 811-2). The situation on December 31, 1927 is shown by Exhibit Q-6, in the Appendix to this brief. The practice required so

heavy an investment as to discourage sales expansion into new territory, thereby tending to fix or freeze an existing competitive situation. The small refiner with limited working capital was obviously at a disadvantage, as compared with larger or better financed competitors, under a system which involved maintaining stocks at hundreds of unnecessary points, and the inevitable result of the practice was to restrict competition, particularly that of the small refiner (R. 996).

The Trial Court, while conceding that the ex-consignment business of the small refiner was necessarily limited, by reason of his financial inability to maintain stocks at a large number of consignment points, says that the limitation of consignment points had "some disadvantages" for him (Finding 136, R. 298). That the prejudice to the small refiner's competitive position from the excessive multiplication of consignment points far outweighed any disadvantages resulting from a reduction in the number of such points is clear from the small refiner's enthusiastic cooperation with the Institute's efforts in this direction.

The Cost of Carrying Consigned Stocks.

The multiplication of consignment points and the duplication of refiners' stocks at these constantly increasing points throughout the country in the years immediately preceding the formation of the Institute resulted in the annual expenditure of millions of dollars without any corresponding benefit to anyone in the trade.

The principal elements of the cost of maintaining consigned stocks were storage and handling charges and interest on investment. Other items of cost included insurance, taxes and damage incident to storage. Storage and

handling charges varied, but averaged at least 7c for every 100 pounds of sugar. This was composed of an average charge of 6c for first month's storage and handling in and out, with 1c added for additional storage (R. 924-5, 929-30). Interest on investment varied in accordance with the price of sugar, interest rates and turnover, but on a conservative basis, amounted to between 2½c and 3c per bag (R. 930). Insurance, taxes, damage to sugar, etc., also had to be added (R. 930). *Thus the cost of maintaining consigned stocks amounted to at least 10c for every bag delivered from consignment as shown by the testimony* (R. 930). *The total cost to the industry of consigned stocks varied between $2,500,000 and $2,900,000 per year* (Ex. W-6). If all deliveries were made from consignment, the additional cost to the industry, which in the long run would necessarily fall upon the consumer, would be between $8,000,000 and $10,000,000 per year (Ex. W-6).

In the face of this evidence, impossible of contradiction, the Trial Court conceded that "the cost of increased consignment points might well be reflected in a higher general basis price" (Finding 137). Clearly, such a consequence is not a mere matter of speculation. Every item of cost is necessarily and inevitably reflected in the refiners' basis price and the Court's condemnation of concerted efforts to eliminate this tremendous expense (Finding 137, R. 298) on the ground that "there is no assurance" that the savings effected thereby would be passed on to consumers generally is, it is submitted, unreasonable in the extreme. The Trial Court's refusal to concede that savings effected by the refiners through elimination of economic waste would result in a lowering of basis prices is to be contrasted with the Court's unhesitating assumption that a "quantity dis-

count" received by Coca-Cola and other manufacturers would result in a lowering of the prices charged by such manufacturers for their product. (See p. 118, *supra.*)

The Court further argues that "Refiners individually could, as they concertedly did, at one time, impose a service charge on consignment deliveries" (Finding 137, R. 298). Such an argument is obviously theoretical rather than practical, since it was as impossible for one refiner acting individually to shift from all of his buyers, to buyers actually drawing from consignment points, the cost of maintaining consigned stocks, as it was for one refiner to abolish single-handed the concession system. Yet the imposition by refiners of a service charge on l.c.l. deliveries from consignments for a brief period in the latter part of 1928, pursuant to recommendation by the Institute, is condemned by the Trial Court as "unduly and unreasonably restraining trade" (Finding 141, R. 298), despite the fact that the 5c service charge announced by one refiner and followed by the rest was only half of the actual cost of such service, despite the fact that Clause 3 (g) of the Code of Ethics, approved by the Department of Justice, expressly condemned "Special services to customers without appropriate charges therefor", and despite the testimony of the Government's own witnesses as to the unfairness of their not receiving a lower price on direct shipments than on consignment deliveries (R. 508, 513, 431).

It is submitted that concerted action with respect to matters of this type does not constitute an undue or unreasonable restraint of trade within the meaning of the Sherman Act. In view of the admitted fact that the fierce competition among the refiners broke down their attempt to maintain, by what the Court says was unlawful concert of action, the special service charge of 5c on consignment

deliveries, representing only half of the extra cost of such service, the Court's suggestion that it was practicable for refiners to shift this expense to the buyers by *individually* imposing a service charge to defray the full cost of consignment deliveries is a remarkable inversion of logic.

Consigned Stocks of No Real Value to the Trade.

The Trial Court, in holding unlawful the efforts of the Institute to remedy the excessive waste of the consignment situation, states that buyers suffered material disadvantages as a result of the reduction in consignment points because

> "* * * demand could not be accurately forecast, customers might be left with a shortage of one assortment and surplus of another; inadequate stock facilities restricted market areas; financing larger stocks was difficult for customers; there was a loss of the convenience of getting deliveries in less than carload lots" (R. 170).

It should first be noted that none of the statements made in the paragraph quoted applies to manufacturers, who, as pointed out elsewhere by the Court, purchase one-third of all sugar sold by defendants (R. 183). But, even as applied to the balance of the refiners' customers, these statements are not supported by the evidence.

Fochheimer, a Government witness, testified:

> "Prior to 1929 I bought in carload lots from the refiners and had no difficulty in anticipating the assortment needed for my customers. We knew pretty well what they wanted and considered it our business to know their wants. It was not a serious problem to anticipate" (R. 572).

Campiglia, who had had twenty years' experience as a sugar jobber before becoming associated with C. & H., testified:

> "* * * Most any jobber handles a carload of sugar on an average of 1 car a week. He determines what assortment he wants from his knowledge of the demands of the retailers in his territory and from the business that he has had from them in the past. In my 20 years' experience I had no trouble in predicting the assortment I needed" (R. 812).

Flintom, operating a wholesale grocery business, testified:

> "* * * We have no difficulty in gauging the assortments which we need. We use about the same assortments from week to week. We anticipate our requirements more carefully than we did when we had consigned stocks" (R. 957). "* * * By knowing approximately what we are going to use, we can anticipate our requirements very easily a week or even a month ahead with reasonable accuracy" (R. 960).

The Conclusions of the Court quoted above appear to be based in large part upon the testimony of Government witness Taylor of Wilmington, N. C., a wholesale grocer. Taylor stated that:

> "My objection was that after the elimination of Wilmington as a consignment point *we had to anticipate our customers' wants and know what assortments they would demand.* Very often we had too much of one assortment and not enough of another. As long as we had a consignment stock in Wilmington *we never thought what our trade would*

> *need,* but on receipt of an order called up the warehouse. *We did not anticipate in any degree what our trade wanted but we had to do so after Wilmington was eliminated as a consignment point"* (R. 558).

In short, the witness Taylor objected to the novel necessity of being required to exercise a modicum of business intelligence and to give some thought to the requirements of his trade. It is submitted that the inability or disinclination of isolated customers to exercise the same small degree of initiative involved in estimating their customers' needs, as other wholesalers and jobbers throughout the country were easily able to do, constitutes neither an economic nor a legal basis for requiring continued maintenance of unnecessary consignment points throughout the country at a cost to the industry, and therefore to the public, of millions of dollars a year.

The Court dwells upon the "loss of the convenience of getting deliveries in less than carload lots" (R. 170). As shown by the evidence, a carload, 400 to 600 bags, represented only a week's supply for the average customer (R. 956, 812, 958). However, reduction in the number of consignment points did not prevent a buyer from continuing to secure less than carload lots by direct rail shipment, or when nearby, by truck from the refinery, or by truck from a nearby consignment point. Moreover, the pool car afforded him a means, used by the very smallest of the dealers, whereby he could club together with other customers, each one securing less than a carload lot at the carload rate. This was a common practice (R. 928) and various Government witnesses testified that they had followed it without difficulty after the withdrawal of

consigned stocks (R. 545, 546). Concededly, customers who, on occasion, might desire to obtain instantly a few particular grades and packages lost the convenience of being able to send a truck around to a consignment warehouse a few blocks away, but at a cost of several million dollars annually such a convenience is priced too high to permit either economic or legal justification.

Despite the "inconvenience" referred to, the Government failed to produce a single witness who could testify to any lack of prompt service in obtaining sugar at points where consigned stocks were eliminated. Castle, of National, a refiner selling in the area with the fewest number of consigned stocks (Ex. F-15, R-6), testified that all of National's customers could be, and when requested were, reached by direct shipment within twenty-four hours through the use of transit stocks, but that customers normally called for delivery about four days in advance, so that twenty-four hour deliveries were exceptional, being for emergencies (R. 927). Flintom confirmed this and testified that the service on sugar was better than on most commodities (R. 957, 959). See also the testimony of the Government's witnesses Giering and Cass on this point (R. 545, 546).

The elimination of some of the excessively multiplied consignment points, pursuant to Institute recommendations, did not detract from any real service to customers, and with the development of trucking and general speeding up of transportation since 1928, service was better and fewer consignment points were necessary than before (R. 929, 957).

It is clear from the testimony that consigned stocks constituted an expensive luxury for the customer (R. 959) since withdrawals from consigned stocks actually increased

buyers' costs. The sugar dealer's chief expenses are for handling and delivery, carrying retail customers' accounts and general overhead, *none of which are reduced in any way by availability of a consigned stock.* The Trial Court's statement that "financing larger stocks was difficult for customers" overlooks entirely the fact that the ordinary wholesaler or jobber avoided entirely any financing of sugar purchases.

> "We do not have any carrying charges on sugar after we get it from the refiners and before we deliver it to the retail trade because we have a turnover of about a car a week and the payments have been 7 days from date of arrival. The terms have always been at least as favorable as 7 days after arrival" (R. 958).
>
> "The customer turns over sugar about once a week. * * * he stocks once a week and pays for the sugar every 7 days so there would be no carrying charges. This is so even though he is taking his sugar by direct shipment" (R. 930).

The small storage and insurance costs of the customer (R. 958, 930) were offset by the customer's expense in trucking the sugar from the consigned stock to his warehouse. This was not only the testimony of Flintom, a defense witness (R. 958, 959), but was also cited by Lowry, a leading Government witness (R. 380). Customers located at consignment points generally ordered for direct shipment instead of consignment delivery to avoid this higher cost and also to insure fresher stock (R. 928, 957, 959).

An increase in consigned stocks does not produce a corresponding increase in their use. *Thus, while the aver-*

age amount of sugar on consignment increased 48% from 1928 to 1931, deliveries from consignment increased only 11% (Ex. T-6). Consigned stocks, of no real value to the customers, are used when available only because of the human tendency to rely upon them and to fail to order in advance. It is simply the case of the consumer, who, with a grocery store in his own block, will order several times a day, whereas with the store more distant he would exercise foresight and order only once with no real inconvenience (R. 957). It is submitted that this small element of possible convenience affords no justification for the expenditure of millions of dollars annually.

The argument made by the Trial Court with respect to "the advantage" enjoyed by a community chosen as a consignment point (Finding 138, R. 298) completely ignores the sheer economic waste resulting from such a duplication of stocks. *"Inequality" of the type referred to could be eliminated only by the placing of consigned stocks at every point in the country where sugar is sold.* Both this objection and the objection that the abandonment of unnecessary consigned stocks eliminated "desk" jobbers (Finding 139, R. 298) entirely overlook the fact that consignment points had been regarded historically in the industry as centers from which to distribute to a surrounding area, rather than as a purely local means of supply and that the purpose was to give prompt service and not to carry the jobber's sugar for him (R. 811, 927).

The Institute's Recommendations.

Even though, for the reasons already reviewed, consigned stocks represented a waste not compensated for in

a corresponding benefit to anyone, no single refiner could solve the problem because he could not withdraw his stocks unless all other refiners did likewise (R. 927, 813-4). The consigned stock held no real advantages for the trade, but the sales argument was sufficient to swing business to the refiner maintaining it. In order to solve the problem therefore, the refiners had to act together.

Consequently, after full discussions with the Department of Justice, during the course of which the entire situation was reviewed (R. 618, 620), paragraph 5, dealing with consignment points, was incorporated in the Code of Ethics.

> "5. In the interest of a more even distribution to the trade, the Institute recommends that sugar shall be consigned only to recognized detention points for reshipment, or to recognized markets and then in care of railroad or steamship lines or to public *warehouses, and that the control of the sugar shall remain with the refiner.
>
> *The words 'or brokers' appearing before the word 'warehouses' were stricken out by resolution adopted May 2, 1929."

Under this provision of the Code, the Institute recommended the elimination of unnecessary and wasteful consignment points. The recommendations made by the Institute are all shown in Exhibit R-6 in the Appendix hereto, as well as the additional points added by refiners. The recommendations taken together cover the entire country with the exception of the eleven western states, Arkansas, Illinois, Missouri and the upper peninsula of Michigan, as to which no recommendations were ever made. The eleven western states were not considered be-

cause this territory had few or no consignment points (R. 811), and the remaining states were not covered because of the impossibility of securing unanimous approval (R. 919).

Refiners were under no obligation to approve a recommendation and at times did refuse approval. For example, in the case of Illinois and Missouri, the refusal of Godchaux to consider any program made Institute recommendations impossible. The consequences thereof are graphically illustrated by Exhibits U-6 and V-6, in the Appendix, which gave a detailed study of the situation which developed in Illinois. Stocks carried in small towns constantly increased. The number of refiners carrying stocks in a town frequently exceeds four, and runs as high as nine or ten. Total stocks carried frequently exceed twenty weeks' supply. This is in contrast with the one week's supply normally carried by a customer (R. 927, 957).

The result was that in 1930, even after excluding large storage-in-transit stocks, the average consigned stocks carried by all refiners in Illinois represented 5.5 weeks' supply, and in Missouri 4.7 weeks, whereas in Indiana and Ohio, where Institute recommendations had been followed, there were only 2.4 and 1.6 weeks' supply respectively (Ex. X-6). In the absence of this excessive multiplication of consigned stocks, Illinois could be adequately served by direct shipment, supplemented by reconsignments to handle emergencies, from *three* points, Cairo, Mounds and Chicago, or such central points outside the state as Indianapolis, Toledo and Detroit, which are in fact used for this purpose. The requirements of the trade do not necessitate the carrying of this amount of sugar in Illinois, and stocks at such smaller points are not liquid, being too small and restricted in variety to use for reconsignment. They are frozen for

the particular locality, and if not exhausted by local consumption the sugar gets out of condition or must be moved at a heavy expense (R. 928). The waste involved in such a practice is apparent.

Furthermore, even when a recommendation had been adopted by all interested refiners and had become effective, any refiner was entirely free to change his mind at any time thereafter and add additional points. Refiners in fact did so frequently (R. 923, 928, Ex. R-6). In short, there was at no time any binding agreement of any nature whatever, and every refiner was at all times free to, and did in fact, exercise his independent judgment (R. 814-5).

Exhibit R-6 in the Appendix shows the extent to which refiners did disregard the Institute's recommendations. For example, in Wisconsin, for which the Institute had recommended four consignment points, additional points added by the refiners by the end of 1930 totaled twenty-six, and by July 16, 1931 thirty-one. Similarly, points were added in Minnesota, North Dakota, Kansas and Iowa, although the recommendations in these states, as in Texas, were defective in that too many points had been included in the first place (Ex. R-6 and U-5). The Institute in making these recommendations had proceeded on the theory that some progress was better than none (R. 923).

Reconsignment Points and Ports of Entry.

In making its recommendations on consignment points, the Institute, except in the case of southern territory, did not mention storage-in-transit or reconsignment points, *i.e.*, points where refiners carried stocks *for forwarding in carload lots only*. They were never considered in other areas

(R. 919, 928). While storage-in-transit or reconsignment points were established by the carriers' tariffs in other sections of the country, there were none in the south except a few on the Government barge line, and the report of the Committee on Consignments in southern territory *recommended the continuance of all such points in use at the time* (R. 919). Yet the Trial Court concludes that a recommendation of *all reconsignment points in use at the time* was an "intentional restriction to the points named and tended to prevent an increase". Such a Conclusion is comparable to the Court's Finding that the Institute's express approval of the refiners' customary practice of "repricing" represented a deliberate attempt to prevent repricing of a type that had never existed in the industry. (See *supra*, pp. 59-61.)

The recommendations of the Committee on Consignments points for the south, differing again from those for other areas which only recommended "consignment points", classified them into "ports of entry" and "refinery points" (Ex. 447-q, 389-y). This division of consignment points into two classes, those located at refining points and those located at other seaboard ports, was unnecessary, inaccurate and confusing, because the list of points included certain cities which were in neither class. The Committee merely applied the term "port of entry" to certain consignment points which were on the seaboard (R. 920). Most of the principal coast towns were named as consignment points (Ex. 389-y), and even as to the few not named, there was no recommendation against shipping to or through them (Ex. 389-z). The duty of the Committee was to recommend *consignment points* and despite inappropriate and confusing terminology it merely did this. There was no restric-

tion of ports of entry as such, and Wilmington, the single city referred to by the Court (Finding 134), was eliminated as a storage or *consignment point* but not as a *port of entry.* Refiners continued to ship sugar by water to Wilmington (R. 931).

Liquidation of Consignment Stocks to be Discontinued.

Once a consignment point was to be abandoned a problem arose as to the procedure to be followed. Several refiners might have stocks there, and if they were all small or about the same size, the consignment point was eliminated merely by the refiners not making any further shipments to it, allowing their existing stocks to be consumed in the natural course of business. This was the method generally used.

In some cases, however, the stocks of the several members at certain points were not uniform, one or more refiners having exceptionally large stocks, so that if all of them simply discontinued shipments the result would be that the refiner with the large amount of sugar would continue to have a stock long after the others had been exhausted. This was the situation at Fort Wayne and Toledo (Ex. 447-a-1). The effect of this would be to give the refiner with the larger stock an advantage in the local market. The equalization idea was adopted as a fair and practical solution of this situation. It was simply that all refiners having stocks smaller than the largest one might, if they wished, ship enough additional sugar to bring their stocks up to the high one, so that all would be exhausted at more or less the same time (R. 920-1). The result was

to preserve equality of competition during a necessary period of adjustment (R. 929).

The equalization method was used only for Fort Wayne and Toledo and in the southern area (R. 921). The Institute in such cases secured reports of stocks on hand at the date as of which no further shipments were to be made, broadcast a report giving the amount of the highest stock at each point so that all other refiners might build up to the amount of the highest stock, and thereafter secured and relayed reports showing the gradual process of elimination by normal consumption (R. 920-21). Of course, in all these cases the refiners had already expressed their desire and intention to eliminate the consignment point (R. 925-6). Every refiner was, however, free to change his mind whenever he desired, in which case that particular recommendation would be disregarded and the equalization process would also be disregarded. This actually occurred at Toledo, since after the equalization process had gone on from November, 1929 to July, 1930, and was just about concluded, National insisted that Toledo be restored and it was added to the list of recommended points (R. 921, 929).

Summary.

The fact is that the Institute's program as a whole was not successful. Total consignment points actually increased from 344 in 1927, to 347 in 1930, and 468 in 1931, and total consigned stocks from 670 in 1927, to 1,153 in 1930, and 1,796 in 1931. (Ex. S-6, Appendix). While weekly average total deliveries from consigned stocks increased only slightly, weekly average total consigned stocks greatly augmented, resulting in a slower turnover

(Ex. T-6, Appendix), undoubtedly due to the uneconomic stocks were placed in certain states such as Illinois and Missouri. Total deliveries from consignment increased each year, beginning in 1928, the figures for the four years to and including 1931 being 26.28%, 27.24%, 29.29% and 32.53% (Ex. W-6, Appendix). In the face of such a showing it is clearly evident that the individual refiners determined and followed their own independent policies. There was a concerted action only in the sense that members would approve and declare their adherence to a program, with entire liberty to deviate therefrom at any time by open announcement.

We submit that in the face of these facts, the Finding of the Trial Court that the refiners' efforts in respect of the reduction of consignment points "unduly and unreasonably restrained trade" (Finding 141) cannot be sustained. A mere reduction in the excessive number of such stocks cannot restrain any really useful competition. And the excessive multiplication of such stocks requires so heavy an investment as to discourage sales expansion into new territory, thereby tending to fix or freeze an existing competitive situation. The small refiner with limited working capital is at a disadvantage under a consignment system, as compared with larger or better financed competitors, and competition is thus restricted, not promoted (R. 929, 996, 620). Such are the realities of the competitive situation.

We have here, therefore, an unfair and uneconomic practice, restrictive, not promotive of competition, which, like other evils, can only be eliminated by concerted action. It is submitted that under such circumstances concert of action, reasonable in scope and method, neither resulting in any obligation nor determinative of future policy, is en-

tirely proper and lawful. To hold otherwise is to destroy the possibility of American business men joining together to abolish wasteful and destructive practices which cannot be otherwise controlled. We cannot believe that such activities are prohibited by the Sherman Act.

V. DELIVERED PRICES.

During the period between April, 1929 and May, 1931 the refiners selling in the Great Lakes area adopted the policy of selling only upon delivered prices in this territory. A similar policy was introduced in the Warrior River area during the period between December, 1929 and May, 1930. The Trial Court has found that:

> "* * * *While the direct evidence is that there was no agreement in introducing the delivered prices,* there is substantial evidence from which the inference may reasonably be drawn that the refiners acted, not independently, but concertedly and as a result of combination and conspiracy. If it were necessary, I should draw such inference. I deem it unnecessary, however, to make a finding thereon because even if delivered prices were not so adopted originally, I find that defendants agreed to maintain and concertedly maintained the system of delivered prices in both the Great Lakes and Warrior River areas" (Finding 105, R. 291).

Appellants deny without qualification that delivered prices were either introduced or maintained through any concert of action, combination or conspiracy. We submit that the evidence not only does not warrant the inference found by the Trial Court, but shows affirmatively and over-

whelmingly that delivered prices were introduced independently by individual refiners and resulted solely from free and unrestrained competition between them, and that they remained in effect, for the limited period of their existence, without any understanding, agreement or concert of action on the part of defendants, until they were broken down by the very forces of competition which had brought them into existence.

We shall consider first the manner in which delivered prices were introduced by the individual refiners. We shall then review the evidence with regard to preceding events found by the Court to permit an inference of concert, combination and conspiracy. Finally we shall discuss the evidence relied upon by the Trial Court in support of the Conclusion that delivered prices, if not originally introduced by concerted action, were so maintained pursuant to unlawful agreement.

(a)

The background may be stated briefly in the language of the Trial Court:

> "As the basis f.o.b. refinery price of the several refiners was usually the same or varied only slightly, individual refiners sold in areas beyond the territory in which their freight costs were as low as or lower than those of all other refineries, by paying or absorbing part of the transportation charges" (Finding 88, R. 286).
>
> "The freight applications of the refiners selling at a given point have always been the same at any given time, because any refiner who failed to meet a lower freight application, would for all practical purposes, lose the market" (Finding 89, R. 286).

"The freight situation was complicated in certain markets which were served by differential routes, that is, routes which were slower than the standard all-rail routes and involved all-water or a combination of water and rail transportation. The rates via these routes ranged up to 27c per 100 pounds cheaper than all-rail rates. * * * The most important of these routes served various areas around the Great Lakes and in the Mississippi Valley and tributary territory" (Finding 94, R. 287).

"Traditionally in the industry, the refiners' freight applications on sugar delivered at Great Lakes ports, regardless of how it actually moved, openly broke down during the season of open navigation to the Philadelphia lake and rail rate and during 1926 and 1927, the freight application on sugar sold in the Warrior River area (Alabama, Tennessee, Kentucky and parts of Indiana) had openly broken down to New Orleans barge rates, regardless of how it actually moved" (Finding 96, R. 287).

"At the lake ports and in the Warrior River area, refiners from different points competed.

"There was a tendency in these territories for freight applications for all sugar, regardless of how it actually moved, to be broken down to the level of the cheapest service carrying a substantial traffic. This tendency increased after the Institute was organized" (Finding 97, R. 288).

The reason for this progressive breakdown in freight applications is clearly stated in the Opinion of the Trial Court:

"* * * At the lake ports and in the Warrior River area, refiners from different points competed. One, Savannah, had access to no differential routes into

these territories. The differential routes available to others differed in rates and efficiency of service. Thus the situation of New Orleans, Philadelphia and New York refineries differed in these respects. Refiners accessible to routes combining low rates and reasonably efficient service naturally were inclined to promote the sales advantage of their position. Thus a New Orleans refiner might be able to take from Savannah an Alabama customer by showing the advantage in using barge transportation which was cheaper than the rail route from Savannah. To meet this competition, Savannah would give rail shipments or shipments out of consignment to Alabama customers and charge only the barge rate from New Orleans as if the shipment had actually been made therefrom, absorbing the difference. Such a step by Savannah would compel the New Orleans refiner, if he wished to keep the customer, to quote still more favorable terms because obviously, a rail shipment or delivery out of consignment by Savannah provided more rapid service than the New Orleans barge service. To meet the competition, therefore, the New Orleans refiner might give the Alabama customer actual delivery by rail or ex-consignment and charge only the barge rate. Or he might ship by barge and give to the customer as a sort of bonus the difference between the barge and rail rate.

"There was a somewhat similar situation at the Great Lake ports where Eastern, New Orleans and California refiners competed and where many differential routes with varying rates and service served further to complicate the set-up" (R. 131-2).

The events immediately preceding and leading directly to the introduction of delivered prices in the Great Lakes area may be stated in the language of the Trial Court:

"During April, 1929, a series of events occurred which broke down freight rates in the Great Lakes area to new low levels. Defendants thus describe these events: Arbuckle with its refinery in Brooklyn, had failed in 1928 to develop business by the canal and lake all-water service from the east, a service most advantageous to New York refiners. This was by far the cheapest service available to canal and lake ports and was not matched by the routes available to the Philadelphia, New Orleans and California refiners and the beet sugar producers, competing at the same points, or some of them. As a result of Arbuckle's failure to develop business by the all-water route, it was itself suffering from the water shipments of its three local competitors, American, National and Federal. It studied the matter during the winter of 1928-9, while navigation was closed, and in the spring of 1929 determined to break the freight applications to the lowest rates available to anyone, the all-water rates, irrespective of routing.

"Meanwhile, two of the Eastern refiners, in March and April, 1929, quoted reduced rates at certain lake ports without open announcement. Moreover, Edgar was causing uncertainty because he had tied up the most desirable boats. The Institute sought, defendants state, to learn what Edgar's space was costing him and have him openly announce his freight rate quotations for the coming season, but without success.

"On April 22nd, Great Western, a beet sugar producer, openly cut the freight application at Chicago and Milwaukee to water rate figures, and was immediately followed by the two California refiners. Other refiners selling in those markets, with the exception of Arbuckle, followed this announcement. On April 24th, Arbuckle consummated its own plan by announcing new freight applications for nine

> points, all canal and lake ports except Cincinnati. The Arbuckle rates radically reduced the then freight applications at those points. Pennsylvania and McCahan on April 25th and 26th followed Arbuckle's announcement and extended it to deliveries from consignment, so that the new freight applications now applied to all classes of service" (R. 141-2).

Such was the situation which led up to the first announcement of delivered prices by American on April 29, 1929. That announcement represented American's effort to meet the intense and difficult competitive situation in which it found itself (R. 789-90). Prior to American's announcement of April 29, 1929, there had been some discussions of the delivered price principle in general, but, as hereinafter shown, these had led to nothing, and when American made its announcement *it was entirely upon its own initiative, to meet an actual emergency created by Arbuckle's announcement.*

American, although it met Great Western's, did not meet Arbuckle's announcement (R. 789). Abbott, who alone originated and determined American's policy (R. 790), testified that upon consideration of the Arbuckle announcement he realized that to follow it would entail large losses for American and would cause serious complaints from inland jobbers who competed with those located in port cities (R. 789). His testimony continues:

> "I finally concluded that the only satisfactory solution would be to establish a system of delivered prices in those markets, giving the customers the benefit of some reasonable rate that we would fairly apply, something out of which we would neither make nor lose any substantial amount of money, to

work out some basis of rates to be applied to delivered prices in connection with our basic price, which would make a fair and equitable adjustment to the customer and the refiner.

"I locked this thing in the bosom of my mind or conscience and over the week-end at my home in the country, after studying the various rates I could use, selected the one which I thought was fair and prepared what I thought was a fair announcement for American to adopt as its selling policy in these markets.

"I had, up to that time, talked to no one in my organization about it. I talked to no one outside of my own organization about it, but in view of the fact that it was a new departure for the company and involved a rather substantial question of policy, and in view of the fact that I was only the general counsel at that time, I thought it should be passed on by one of my superiors and I presented the whole matter to Babst, chairman of our company, on Sunday, April 28. I told him I believed that American, as a matter of policy, should put out this announcement on the opening of business the next morning, without saying anything to anybody, even in our own organization, about it.

"He was not a transportation man and took my recommendations as to the rates. As far as the policy was concerned, he acquiesced to my recommendation, and on Monday morning I told our general sales manager to have that announcement copied and put out in the regular way. That instruction was followed.* * *

"I did not consult with anybody connected with the Institute in regard to the matter. A year or so previous, in 1928, when these questions were first considered by the Institute Judge Ballou agreed with me that the Institute could not do anything about it.

> "I had no conversation with Judge Ballou or anybody else other than Babst. I did not talk to any of our competitors or their representatives. Not having discussed it with them, I could not have had any assurance that they would go along with us" (R. 789, 790).

Once American had acted, the other refiners had a clear choice between following it or following the Arbuckle announcement. It was an unpleasant choice for those formerly enjoying the advantage of the lower rates as a sales argument (R. 855), but they had to act, and it is not surprising that they chose the higher level in order to avoid the excessive losses which would otherwise have to be taken. Arbuckle itself followed the American announcement because its own announcement had caused dissatisfaction among inland customers back of the ports, a point to which Arbuckle had given insufficient consideration, and also because it thought that the freight absorptions resulting from its original announcement would be reduced (R. 822-3). The western interests likewise followed the American announcement, as was natural, since they had everything to gain by doing so.

The representatives of the various refiners testified without contradiction that in no case of a delivered price announcement was there ever any discussion, consultation, agreement or understanding, and that any such announcement was made with the realization that it might have to be withdrawn if all refiners did not follow (Abbott, R. 790-94; Ripley, R. 732-3, 736; Campiglia, R. 809; Goetzinger, R. 822-3; Placé, R. 833-4; Raymond, R. 854, 857; Lowe, R. 849; Sullivan, R. 884-6).

The delivered price principle having been initiated at canal and lake ports, various refiners made announcements

extending it to other territories in this region. None of these announcements was followed by all interested refiners and all were immediately withdrawn (R. 794, Ex. E-5, F-5).

The refiner which ultimately withdrew delivered prices was Arbuckle, which soon discovered that its expected increase in business at the canal and lake ports did not materialize (R. 823). Arbuckle therefore started to look for a different solution of the transportation problem, and in the fall of 1930 decided upon an entirely new principle of freight applications, the use of a combination of water rates to lake ports plus trucking rates to the interior. It proceeded with the greatest secrecy to develop this plan, in order to get the full advantage of the announcement when made. The preliminary investigations were completed in January, 1931, and the announcement made on May 5, 1931, after many conferences within the Arbuckle organization (R. 823-4, 417, 419-20). All other refiners necessarily met the Arbuckle announcement, since it radically reduced existing freight applications.

Delivered prices in the Warrior River area were first announced on December 14, 1929. They were on the basis of the lowest all-rail rates from any refinery to the destination involved (R. 732). They remained in effect until May 27, 1930, when they were withdrawn (R. 732, 997). The representatives of the various refiners testified that in making all their announcements of delivered prices they acted individually (R. 732-3, 809, 822-3, 884-6, 833-4, 854, 857, 849, 994-5). With respect to this matter the Trial Court states that:

> "* * * I deem it unnecesary to review in detail the facts with respect to this matter. It suffices to say

that the method employed in inaugurating delivered prices in the Warrior River territory substantially parallels that in the Great Lakes region" (R. 148).

(b)

With respect to the introduction of delivered prices, the Trial Court concedes that "there is no evidence of an express agreement pursuant to which the defendants acted" (R. 145) and that "the direct evidence is that there was no agreement in introducing the delivered prices". Although expressly refraining from making a Finding with respect thereto, the Trial Court states that "there is substantial evidence from which the inference may reasonably be drawn that the refiners acted, not independently but concertedly and as a result of combination and conspiracy" (Finding 105, R. 291).

Reference to the Opinion of the Court discloses the basis upon which the inference referred to is predicated:

> "In the present case, under Institute auspices, the desirability of a system of delivered prices as a solution of the industry's transportation problem was developed and sentiment of the members in favor of such a system was cleared; thereafter, despite legal advice to the contrary, the scheme was advocated by individual refiners and to some extent the project was kept alive in Institute meetings and discussed at a time when it was apparent that the transportation problem would soon become acute" (R. 146).

As indicated by the portion of the Opinion above quoted, the "desirability of a system of delivered prices" was discussed *prior to receipt of legal advice to the contrary.* The

statement that thereafter "to some extent the project was kept alive in Institute meetings" is not supported by the evidence. Taylor testified that thereafter the question was dropped entirely (R. 775). Except for an Executive Committee meeting on March 7, 1929 at which "there was a general discussion of various matters of interest to the industry including differential shipments, brokers acting in a dual capacity, the legal aspects of delivered prices, compilation of statistics, compilation of corn sugar and the possible development of levulose" (Ex. 21-26, p. 218), the matter was never again considered. Except in so far as it refers to the defendant Placé, the Court's statement that "the scheme was advocated by individual refiners" is erroneous. Placé was undoubtedly an enthusiast for delivered prices because of the advantage they would afford to McCahan, with its refinery at Philadelphia, but Moog of Godchaux alone showed interest (Ex. 474).

However, greatest emphasis is placed by the Trial Court upon a circular letter of April 25, 1929, from Rudolph Spreckels, President of Federal and an Institute director, to the other members of the Institute. This letter, quoted in full by the Trial Court (R. 142-3) was the immediate result of the final breakdown of the applications at Great Lakes ports as a consequence of Arbuckle's announcement of the preceding day. With respect to this letter the Trial Court states:

> "* * * While there is no direct evidence that Spreckels was urging a system of delivered prices, it is not unreasonable to infer that such a letter would naturally stimulate the adoption of the one system generally recognized as a solution of the troubles of which he complained" (R. 146).

We submit that the Spreckels letter not only did not constitute a plea for delivered prices, but did not represent even a suggestion of delivered prices. It was nothing more than the lament of an injured refiner over the situation resulting from Arbuckle's announcement. Spreckels, together with American and National, was one of the three refiners that had used the water routes and benefited by the sales advantage to them which the difference in the water and rail rates afforded. This advantage had been lost by the action of Great Western and Arbuckle in reducing the freight applications to the level of the differential rates.

(c)

Although refraining from making a specific Finding that delivered prices were introduced as a result of concert of action, the Trial Court finds that defendants "agreed to maintain and concertedly maintained the system of delivered prices" (Finding 105). This Conclusion is based upon two further specific Findings, which, it is submitted, are equally erroneous:

> "In the fall of 1929, defendants acting concertedly through the Institute sought and obtained the assurance of the American off-shore selling agencies that they would adhere to, and conspired with them to adhere to, the delivered prices of the Institute members" (Finding 107, R. 291).
>
> "From the time when delivered prices were first made effective, defendants intentionally created the impression in dealing with off-shore interests, with brokers, with Edgar and numerous sugar buyers in the Great Lakes and the Warrior River area, that the refiners had an understanding not to sell f.o.b. refinery, and that the Institute was responsible therefor. Numerous buyers in the Great

> Lakes and the Warrior River territories were denied the privilege of purchasing f.o.b. refinery and making shipments over cheaper differential routes, and were informed by responsible representatives of defendants that the denials were due to Institute rules and in effect to the refiners' understanding with one another that they would maintain delivered prices. Although there may have been nothing so formal as an Institute 'rule' in this matter, these explanations were not mere excuses or alibis, but were in substance the genuine reasons for the refusal to make such sales" (Finding 108, R. 292).

1. *The Alleged Conspiracy with the Off-Shore Sellers.* Foreign refined sugar is known generally in the trade as "off-shore" sugar, to distinguish it from sugar refined within the United States. The bulk of the "off-shore" sugar sold in the United States is brought in from Cuba, although a small portion is imported from Puerto Rico. The principal brands of "off-shore" sugar sold in the United States are Snow White, sold by L. W. & P. Armstrong, Viscaya, sold by Lamborn & Co., Hershey, sold by H. H. Pike & Co. and Limones, sold by Lowry & Co. (R. 90-1, Finding 15, R. 268-9). With respect to the alleged conspiracy of the refiners with these firms who are engaged in the sale of "off-shore" sugar, the facts were as follows:

Armstrong (through Bass) made frequent complaints that Lamborn and Lowry were not observing their announced prices but were giving secret price concessions (R. 912-5, Ex. 363-A, 364). Taylor in this connection explained to Armstrong that Lamborn and Lowry did not announce their prices and terms openly to the Institute as Armstrong and Pike did, but merely replied from time to

time to specific inquiries as to such prices and terms. Taylor proposed, however, to get them thereafter openly to announce their prices and terms (R. 912). He found that they were willing to do this (R. 912).

Nevertheless Armstrong continued to report the granting of rebates and concessions by Lamborn and Lowry and notified the Institute that it felt obliged to cease its observance of its announced prices and other principles of the Code, returning obviously therefore to the old system of secret rebates and discriminations (Ex. 364-A). The Institute naturally viewed this step with alarm. Because of the lack of publicity of their prices and terms, there was no way of telling whether Lamborn and Lowry had actually given secret concessions to some customers or were treating all customers alike. Taylor explained to Armstrong that he would further discuss the question with Lamborn and Lowry and attempt to obtain specific announcements from them as to their practice covering any particular points desired by Armstrong (R. 913).

In this endeavor Taylor discussed the question personally with Lamborn and Lowry and attempted to obtain specific announcements from them as to certain of their terms, including freight applications at delivered price points. Lamborn and Lowry gave Taylor orally, among other statements, *an announcement of their policy in this respect without suggestion or persuasion on Taylor's part.* Taylor did not care whether they sold on delivered prices or not, but he did want to know definitely which policy they had adopted, his interest to this extent being based on the Code principle of openly announced prices. Taylor's testimony as to his conferences with Lamborn and Lowry is clear (R. 913-14):

(LOWRY)

"* * * I discussed the matter at some length with Lowry. I referred to my previous request that he openly announce any changes in his prices or terms and reminded him of his assurance that he would. * * * Lowry assured me that it was his continuous purpose to cooperate with the Institute and I asked him to tell me *what his practices were.* Bass" (of Armstrong) "had stated that *Lowry had announced delivered prices* in areas that had been announced by refiners and subsequently had sold sugar at those points *at other than the delivered price rates announced.* Lowry said that he had sold his sugars, at such points as he sold, within the so-called delivered price area, at prices which were announced from time to time by the refiners. * * * I asked him to announce the freight applications *on which he himself was selling sugar to the trade.*"

(LAMBORN)

"Afterwards I had a conversation with Lamborn and George Wright, one of his assistants. The conversation I had with them was almost identical with that which I had with Lowry. * * * I told him Bass complained that at certain up-state points *where they had announced a delivered price selling basis,* that they had *sold at other freight applications.* Lamborn denied this. He said it had been their continuous policy that year to apply delivered price bases wherever they sold in the so-called delivered price area."

"After the conversations with Lamborn and Lowry, I reported to Bass the statements which they made regarding their practices in the matter of selling under delivered prices, their trucking practices and that they had not intentionally deviated from their announced selling prices from time to time and

that they thought those misunderstandings had grown out of their having had a different differential in different parts of the country upon a few occasions. I gave him especially the announcements of Lamborn and Lowry with respect to delivered prices and to trucking, the things which Bass had complained about. He said it sounded all right but that he had been disappointed so many times by these verbal transmissions of reported practices of these other off-shore fellows that he would not be satisfied until we could secure for him a statement over the signature of these respective companies. I tried to dissuade him from this position, feeling that it would be somewhat embarrassing for me, but he was insistent and before a half an hour had passed he had a written document in my office renewing the demands which he had made over the telephone" (Ex. P-6).

* * *

"Upon the receipt of that letter, I addressed the Lamborn and Lowry organizations regarding the matters which we had discussed, my object being to get them to confirm the things which they had stated to me on the previous day and which I had reported to Bass. I therefore drafted a letter reiterating to both of them the substance of my motive, which was the attitude of the Armstrong Company. I followed the substance of the letter which Bass had written to me in the formation of my letters to them. Exhibits 343 and 324 are the letters which I wrote to Lamborn and Lowry. They are identical except for the addresses. Exhibits 324-B and 324-C and 343-A and 343-B are the replies I received to my letters and I showed them to Bass. He stated he was glad to have the information in this definite form and would continue to sell his sugar on the basis of open prices publicly announced."

Taylor's letters to Lamborn and Lowry were identical (Ex. 343, 324). The important parts of the letter follow:

"In further reference to the request of our Executive Committee *which I have discussed with you* and which is indicated by the excerpt from our Executive Committee Minutes herewith, it seems important to add a few other items. * * *

"You have already indicated your willingness *to announce your prices* to the Institute and I think it will not be our disposition to use these beyond the point of answering any inquiries that may be directed to us concerning them. You have also indicated your willingness *to subscribe to the general open selling terms* adopted by the Institute, and we feel that it is important that certain features of these terms should be understood in detail *in order that we may intelligently answer any question that arises concerning your practices.* * * *

"Other considerations in reference to 'Terms' should be understood as including subscription to the Institute's Code Rulings, especially as to storing sugars only in warehouses that are not affiliated with buyers or brokers, and discontinuing consignments to buyers' warehouses with such exceptions as are made in general practice of other refiners. * * *

"We would also like you to tell us that you will quote sugars only on delivered price basis to such points as are being generally sold on this basis. This latter is not an Institute matter but an item of importance to all parties concerned.

"While we know that you have pledged yourselves to your association to conduct your business ethically and use no part of the brokerage paid to you to benefit buyers either directly or indirectly, we would appreciate your telling that to us specifically, and that you will in substance follow the

ethics and practices of Institute refiners under the present rulings of the Institute and as they may be changed or initiated from time to time and made known to you, and finally that in case of any deviation from such practices you will promptly notify us to this effect.

"If the details of this request appear onerous or too exacting, I urge that you consider the motive one of mutual advantage. We have many times been able to squelch rumors and pacify disgruntled complainants who were disturbed by suspicions, by being able to quote definite statements disputing the complaint made by the party who was complained against, and *this is the reason for our request in this matter. It will put us in a position to intelligently answer almost any question or complaint that may arise, and will, I am sure, be appreciated by all members of the Institute.*

"Trusting that we may have your complete cooperation in this matter, and with kindest personal regards of the writer, we are. * * *"

These are the letters referred to and largely relied upon by the Trial Court as the basis of a Finding of an unlawful conspiracy with the off-shore interests in the maintenance of delivered prices (R. 148-9).

It is clear from the circumstances related in the testimony above quoted that Taylor was not interested in *what* the particular terms of Lamborn and Lowry were, but was *only interested in seeing that they were openly announced* (which had not been done theretofore) *and observed unless otherwise announced.* The "assurances" which Taylor requested in Exhibits 324 and 343 were merely *confirmations* of what had *already* been told Taylor by both Lamborn and Lowry, *i.e.,* that they were not secretly discriminating between customers, and were not quoting on a delivered price

basis to some and a lower basis to others, as Armstrong had charged them with doing.

While Taylor's letter is not clear and precise (faults common to many business letters), it is apparent that he was not acting to influence Lamborn or Lowry to adopt delivered prices. In this connection, it will be remembered that delivered prices had been announced by the refiners some six months before the letter in question was written and, according to the statements of Lamborn and Lowry, had been put into effect by them at that time, although not publicly announced.

The Trial Court refused to accept Taylor's testimony in this matter, observing that "if the Executive Vice Secretary had been interested only in open announcement he surely would not have included the sentence italicized by me" (R. 150). The passage in Taylor's letter referred to by the Trial Court is the following:

> "We would also like you to tell us that you will quote sugars on a delivered price basis to such points as are being generally sold on this basis. *The latter is not an Institute matter but an item of importance to all parties concerned*" (Ex. 343, 324).

It is submitted that the inference drawn by the Trial Court is wholly unwarranted. Taylor here merely points out that although delivered prices, as such, are not an Institute matter, they are of importance to all parties concerned. Undoubtedly all this meant was that, while delivered prices, as such, were not a matter of Institute concern and had not been introduced or maintained as a result of any Institute action, as long as delivered prices had been announced by the various refiners and off-shore sellers, it was important to all of them that the announcements be observed, and not departed from in secret, as

Armstrong had charged against Lamborn and Lowry. The sentence italicized is certainly not to be construed as an assertion by Taylor that open announcements of prices is not "an Institute matter". The construction placed upon an inference drawn from the several other letters referred to by the Trial Court are equally unwarranted in view of Taylor's clear and straightforward testimony with respect thereto.

Taylor reported the complaint of Armstrong and his conversations with Lamborn and Lowry to meetings of the Executive Committee. The motives of the defendants are clearly shown by excerpts from the minutes of some of these meetings (Ex. 21-26, pp. 316, 351):

(Meeting of Oct. 24, 1929)

"The Vice-Secretary read a letter from Mr. Bass of L. W. & P. Armstrong calling attention to sales practices of Lamborn & Company who were apparently selling at other than openly announced prices. He stated that it had been the continuous policy of his company to follow the practice of the Institute in selling *only at openly announced prices,* but unless he could have assurance that Lamborn was following a similar policy, it would be necessary for him to change his practice in order to meet competition. He stated that he regretted the apparent necessity of such action and would await the result of the efforts of the Institute to adjust the matter before changing his policy.

"The Vice-Secretary made reference to the splendid cooperation the Institute had received from the Armstrong Company. The Committee instructed him to confer with Lamborn and Lowry *to see if they would be agreeable to adopting the open price policy in the sale of the sugars which they exclusively represent.*"

(Meeting of Dec. 12, 1929)

"The Vice-Secretary reported the result of various conferences with Lamborn and Lowry regarding the matter of selling sugars for their respective foreign principals *according to the policy of the Sugar Institute, that is only on open prices and terms publicly announced.* Correspondence was read which indicated the position of each as being willing to cooperate."

It is evident that Taylor's communications, both oral and written, with the off-shore producers, were nothing more than attempts to secure the cooperation of Lamborn and Lowry in the observance of the Code and particularly the principle of open prices publicly announced. He neither *sought nor secured* an agreement or understanding with respect to delivered prices, except as to their open announcement if employed.

2. *Blaming the Institute.* The second reason assigned by the Trial Court for his inference that defendants agreed to maintain and concertedly maintained delivered prices, we submit, also fails to provide support for such a Finding. The Court states that defendants "intentionally created the impression" that the Institute was responsible for their refusal to sell f.o.b. refinery, and refiners' representatives stated that such refusal was "due to Institute rules and in effect to the refiners' understanding with one another that they would maintain delivered prices" (Finding 108, R. 292).

Reference to the Opinion discloses that the Court relies, in this respect, upon Taylor's discussions with the off-shore interests, hereinabove reviewed. The Court next states that Judge Ballou gave this "impression" to Eamon, Edgar's

attorney, in the course of a conference with him and Cummings. An examination of Eamon's testimony, however, indicates that Eamon, coming to New York with the preconceived idea that the Institute was responsible for the delivered prices, *was seeking to secure different and preferential treatment for his client Edgar.* It is clear, even from Eamon's own testimony, that Ballou merely explained the position of the refiners themselves and their obligations under their own open announcements.

> *"Judge Ballou and Cummings said that they could not deal with Edgar on any different basis than they did with other people because it would be in violation of the principles of the Institute.*
>
> "I requested that the refiners, instead of enforcing their delivered prices, *sell Edgar f.o.b. refinery and allow him to transport the sugar to Detroit, but they explained that they could not deal with Edgar except on the basis of their publicly announced prices without discriminating against their other customers and violating the principles of the Institute"* (R. 395).

Excerpts from various exhibits next referred to by the Court show nothing more than the refiners' determination to adhere to their own open announcements. Finally, the Trial Court states that "responsible representatives of various refiners stated that they could not sell except on a delivered price basis, because of the Institute" (R. 154). In support of this statement the Court quotes repeatedly from the *direct testimony* of Government witness, Herbert I. Smith, of Johannes Brothers (R. 767, 760, 759, 767, 768), but overlooks entirely the cross-examination of this witness who finally admitted:

"* * * I have no way of telling whether the Institute was responsible for the delivered price system that existed from April, 1929 to May, 1931 except statements by brokers *and they did not indicate that the Institute was responsible for delivered prices. The brokers only indicated that the Institute was responsible for their inability to make an arrangement for selling sugar to us on some basis other than the announced public price and Institute prices*" (R. 404).

Again, the Court relies upon the testimony of Government witness, Joseph E. Weil (R. 3129), as evidence of an admission by American that the Institute prevented sales at other than delivered prices. Weil testified that, at a time when American was selling only upon delivered prices,

> "I asked Hellwig" (American's Cleveland broker) "if we could arrange for a barge shipment from refinery. He said 'No, it couldn't be done at that time, it was against the Code'" (R. 549).

Obviously, a sale to Weil at other than American's own openly announced terms was "against the Code" and such a statement is not properly susceptible of the construction placed upon it by the Trial Court.

Similarly, the Court refers to the testimony of Government witness, Henry King, on direct examination (R. 620-22) as proof of an admission by Colonial that Institute rules precluded it from selling except upon a delivered price basis. Here again, however, the Court overlooks entirely King's testimony on cross-examination (R. 391-2):

> "Wogan, of Colonial, said he could not give me the privilege of buying sugar f.o.b. New Orleans because it was contrary to the rules of the Institute.

> *I understood the announced policy was to give the same price and terms to all brokers.* I understood that if Colonial gave this privilege *to me alone* it would be *contrary to their policy of publicly announced prices* in that territory and would be considered a violation of the Institute rules."

Clearly, even the hearsay statements above referred to and purporting to recount statements made by refiners' agents a long time previously, do not constitute evidence of a nature to warrant the final conclusion of the Trial Court that, despite the clear and unqualified testimony of the refiners themselves to the contrary, appellants "agreed to maintain and concertedly maintained delivered prices" (Finding 105, R. 291).

THE LAW.

Despite the extreme length of the record, the exceedingly complicated facts, and the great number of issues raised before this Court, the legal principles applicable to and determinative of the issues are few, simple and well established. They may be stated briefly as follows:

1. Restraint of competition is not in and of itself unlawful. The Anti-Trust Laws prohibit only those restraints which are undue and unreasonable.

2. It is not an undue or unreasonable restraint of competition for the members of an industry to refrain in concert from competitive practices which are unfair, fraudulent or discriminatory.

3. It is not an undue or unreasonable restraint of competition for the members of an industry to refrain in concert from competitive practices which are wasteful and uneconomic and result in no corresponding benefit to the public interest.

4. It is not an undue or unreasonable restraint of competition for the members of an industry to adopt in concert measures whose purpose and effect is to protect the members of the industry from unfair or fraudulent practices on the part of third parties.

These fundamental principles have been established beyond dispute by a long line of cases decided by this Court of which the following are typical:

Chicago Board of Trade v. *United States,* 246 U. S. 231;
Maple Flooring Association v. *United States,* 268 U. S. 563;
Cement Manufacturers Protective Association v. *United States,* 268 U. S. 588;
Appalachian Coals, Inc. v. *United States,* 288 U. S. 344.

All of the activities of appellants are, it is submitted, clearly justified under one or more of the principles set forth above.

A.

THE CONCERTED ADOPTION AND OBSERVANCE BY COMPETITORS OF THE PRINCIPLE OF SELLING THEIR PRODUCT ONLY UPON OPENLY ANNOUNCED PRICES AND TERMS WITHOUT SECRET DISCRIMINATIONS DOES NOT CONSTITUTE AN UNDUE OR UNREASONABLE RESTRAINT OF TRADE.

(1) The practice of selling only upon open prices and terms without secret discriminations among customers is essential to the functioning of that type of competition which is beneficial to the public interest and has been uniformly approved by the courts.

The competitive system is beneficial to the public interest only when prices and output respond to the free play of the forces of supply and demand. The forces of supply and demand can operate freely only when competition is carried on in the open and buyers and sellers bargain in the light of actual knowledge as to prices, supply and demand. Where prices are secret and competition is carried on in the dark there can be no true market price, but only a separate price for each transaction fixed at the point where the ignorance and cunning of the parties to the transaction come to equilibrium. Such a system is wholly incompatible with and destructive of the type of competition which has always been recognized as beneficial to the public interest and approved by the courts.

The *Steel* Case.

The type of competition sought to be promoted by the basic agreement adopted by the refiners was expressly ap-

proved by both the Trial Court and this Court in *United States* v. *United States Steel Corporation,* 223 Fed. 55; 251 U. S. 417. The opinion of Circuit Court Judges McPherson and Buffington stated that:

> "* * * The proof shows that the Steel Corporation, in the exercise of its own business judgment, has elected *to publicly announce its prices, to adhere to them with all buyers alike, and to give timely notice of its purpose to change them*" (p. 91). (Italics ours.)

In finding no prejudice to the public or undue restraint on competition by this open price policy, but, on the contrary, commending it as in line with legitimate business, the opinion stated:

> "* * * *It is also just to say that in giving timely notice of its purpose to change them, and in giving publicity to its prices, in adhering to them,* it will be seen on reflection that the Steel Corporation has adopted *a policy of price publicity and adherence, somewhat analogous to the freight rate stability followed by the railroads under the directions of the Interstate Commerce Commission, which published their rates and only changed them on notice*" (p. 92). (Italics ours.)
>
> "* * * *the publicity,* which the proofs * * * show the Steel Company has from time to time made of its prices, its accounts, and its policies, *would seem a practice in line with legitimate business,* rather than with illegal monopolization" (p. 142). (Italics ours.)

The judgment in favor of the Steel Corporation was affirmed on appeal by this Court, which, in describing the

fair and wholesome character of the competition carried on by the Steel Corporation, paraphrased and adopted the findings of Judges Wooley and Hunt below on this point:

> "* * * it did not undersell its competitors in some localities by reducing its prices there below those maintained elsewhere, * * * *it did not obtain customers by secret rebates or departures from its published prices*" (251 U. S. 417, 441). (Italics ours.)

We do not cite the *Steel* case for any approval of an "open price" *agreement* among competitors, but for its approval of the wholesome and beneficial character of open prices and terms, with no secret discriminations between customers.

The *Chicago Board of Trade* Case.

The opinion of this Court in *Chicago Board of Trade* v. *United States,* (1917) 246 U. S. 231, was really the first to face squarely an actual "open price" *agreement* among competitors. The practice there attacked by the Government under the Anti-Trust Laws was designed to enlarge and protect the open price policy of the Board, *by prohibiting deviations,* during the time the Exchange was not in session, *from the open prices announced* during the sessions of the Exchange. The rule prohibited members from buying or offering to buy any wheat, corn or other grains "to arrive" at any other price than the closing bid on the Call session (about 2 o'clock) until the opening of the next session on the following day. In short, the price was *fixed* during the greater part of each day.

The Government contended that this rule prohibiting any deviations in private trading between sessions of the Exchange from the open price announcements on the Exchange was *per se* illegal as a restraint of trade. In overruling this contention, this Court held that a practice which created a market of open prices, and which did away with private trading where men had to buy and sell without adequate knowledge of actual market prices, was an *improvement* of market conditions and hence lawful. In holding that the rule in question was "a reasonable regulation of business consistent with the provisions of the Anti-Trust Law", this Court said:

> "* * * the rule helped to improve market conditions thus:
>
> "* * * It created a *public market* for grain 'to arrive.' Before its adoption, *bids were made privately.* Men had to buy and sell *without adequate knowledge of actual market conditions.* This was disadvantageous to all concerned, but particularly to country dealers and farmers.
>
> "* * * It brought buyers and sellers into more direct relations; because on the Call they gathered together for a free and open interchange of bids and offers * * *.
>
> "The restraint imposed by the rule is less severe than that sustained in *Anderson* v. *United States,* 171 U. S. 604. *Every board of trade and nearly every trade organization imposes 'some restraint upon the conduct of business by its members'* (pp. 240-241). (Italics ours.)

The *Hardwood* and *Linseed* Cases.

The decisions of this Court in the famous *Hardwood* and *Linseed* cases, so heavily relied upon by the Government in the case at bar, do not constitute in any sense a

condemnation by this Court of the principle of open prices and terms adopted and adhered to by the refiners. The facts involved in those two cases are so radically different from those presented by the Record and the Findings of the Trial Court in this case as to render detailed analysis unnecessary.

With respect to the *Hardwood* case (*American Column & Lumber Co.* v. *United States*, 257 U. S. 377) it was expressly stated by the Court page 410 that:

> "To call the activities of the defendants, as they are proved in this record, an 'Open Competition Plan' of action is plainly a misleading misnomer * * *" (p. 410).
>
> "* * * that the *purpose and effect* of the activities of the 'Open Competition Plan', here under discussion, were to restrict competition * * * *by concerted action in curtailing production and increasing prices,* * * *" (pp. 411-2). (Italics ours.)

In the *Hardwood* case an active and concerted campaign was conducted by the officers and members of the Hardwood Association, through discussions at their meetings and through systematic written propaganda, to restrain competition *by curtailing production and increasing prices.* As we have seen (p. 58, *supra*), prices and production were not discussed at the meetings of The Sugar Institute, nor did the officers or members of the Institute conduct any written or oral propaganda to curtail production or increase prices. The record in this case is completely bare of any evidence that would bring it within the lines of the decision in the *Hardwood* case.

Neither does the decision of this Court in the *Linseed* case (*United States* v. *American Linseed Oil Co.*, 262 U. S. 371) involve a condemnation of an open competition

plan in the real sense of the term. The *Linseed* case represented a flagrant example of a scheme of unfair competition masquerading under the name of "open" competition. The vital feature in this particular scheme was that *the prices and other information gathered were kept secret among the members of the combination.* The *buyers,* the other participants in the trading, were to be kept completely in the dark. The contracts signed by the members of the combination in the *Linseed* case specifically recited that the information as to prices, etc., was "for the *exclusive* and *confidential* use" of the conspirators, who expressly agreed, in addition, that "all information received from the Bureau or any meeting of subscribers will be treated as confidential".

Each of the subscribers sent to the Bureau immediately upon issue a copy of his published price list, but there was no agreement or declaration that he would *sell* to all purchasers without discrimination on the basis of such list until it was publicly changed. On the contrary, all the provisions of the plan concerning price information *contemplated the continuance of the system of secret discriminations practiced through sales to favored customers below the list.*

The sellers published price lists at which they purported to sell their goods, *but they were entirely free to depart from that list by giving special rebates and concessions to favored customers. These rebates and concessions were secret so far as the other buyers were concerned, but all the sellers were informed of the exact terms of such concessions and rebates as soon as they were offered.* The sellers thus had the buyers completely at their mercy. No buyer knew what his competitors were paying for their goods, but each seller knew the exact terms of every offer

and sale made by his competitors to every buyer. Every seller, secure in his confidential knowledge of every offer made to every customer, could continue to exact the full list price and terms from all of his customers who were not being offered special discriminatory favors by his competitors, and he could gauge his offers of discriminatory advantages to his favored customers in the light of full knowledge of the *exact* offers being made to them by his competitors. The ignorant and unorganized buyers were thus divided into the sheep and the goats, to be herded at will by the sellers. This, of course, was not open competition at all. This sort of a combination of sellers was no device to promote a "free" market or to furnish healthy competition therein. It was a device to protect and perpetuate the evil system of arbitrary discriminations, holding the ignorant buyers within the secure control of the informed sellers and enabling the sellers to practice their discriminations with impunity. It was a peculiarly vicious conspiracy of sellers against the buyers, a factor clearly recognized by this Court in striking down the plan.

In the case at bar, the Sugar Institute was organized to abolish the system of arbitrary and secret rebates and concessions under which part of the buyers had been given unfair and discriminatory advantages over their competitors. And the abolition of these discriminations was accomplished by making all prices and terms open and public. There was no secret consultation or exchange of information among the sellers about prices or offers to buyers. There was complete and immediate publicity of all prices and terms and other important trade information to all buyers as well as to sellers. There was no campaign or propaganda for decrease of production or increase of prices. There was no discussion of prices or production at all.

The Sugar Institute is the complete antithesis of the *Hardwood* and *Linseed* associations in every essential particular, and the case at bar presents none of the elements upon which the *Hardwood* and *Linseed* decisions were based.

The *Maple Flooring* and *Cement* Cases.

The decisions of this Court in the *Maple Flooring* and *Cement* cases recognize both the economic desirability and the legality of the concerted adoption of measures designed to protect and promote the type of open competition sought to be achieved by the appellants in the case at bar.

In *Maple Flooring Association* v. *United States*, 268 U. S. 563, the plan of open competition adopted in concert by the members of the defendant Association which was attacked by the Government as "price fixing", but which was sustained and approved by this Court, included (a) the computation and distribution of statistics showing *the average cost to members* of sizes and grades of flooring; (b) the compilation and distribution of a freight book showing freight rates on flooring from a single basing point to over five thousand specific points throughout the country; (c) the compilation and distribution of specific and detailed information and statistics regarding sales by members, the prices received and stocks on hand; and (d) discussions at Association meetings with respect to the problems confronting the industry.

Referring to the simple economic truths that "exchange of price quotations on market commodities tends to produce uniformity of prices" and that "knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic crises resulting from over-production", the Court states:

> "It is the consensus of opinion of economists and of many of the most important agencies of Government that *the public interest is served* by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, *because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise*" (pp. 582-3). (Italics ours.)

In the absence of the elements of unlawful price and production propaganda, secret consultation among the sellers, and confidential exchange of sales and trade information by a combination of sellers acting against the buyers, which had been present in the *Hardwood* and *Linseed* cases, this Court rejected the contentions of the Government, reversed the findings of the Trial Court and squarely held that:

> " * * * trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce" (p. 586).

All of the practices of the Sugar Institute in connection with the gathering and dissemination of price and trade information are well within the limits of lawful activities as laid down by this Court in the *Maple Flooring* case. In fact, the activities of the Sugar Institute in this connection stop far short of the activities approved in that case. The Institute has never calculated and disseminated figures of "average costs", or any other figures which might be used to fix or suggest minimum selling prices, as was the practice of the Maple Flooring Association. Each member of the Institute has at all times determined his own selling price in free and open competition with every other member, without any Institute calculation or discussion to guide or influence his action.

The relaying by the Institute of the price change announcements of the members *after they have already been made public by the members* in the same way in which they had always been made public before the Institute was organized, is clearly in line with the principle of publicity of market information approved in the *Maple Flooring* case. It merely gives wider and more accurate publicity to what has already been publicly announced. It has none of the qualities of private propaganda for increase of prices or secret consultation about special offers to favored customers which were condemned in the *Hardwood* and *Linseed* cases. It is the exact opposite of those furtive practices and is the closest parallel which can be realized in an industry of this character to the competition of the Stock and Produce Exchanges, which is held up by economists and courts alike as the ideal of free and open competition.

Since the price information gathered and disseminated by the Maple Flooring Association related only to sales al-

ready made, the decision of this Court was, of course, limited to the facts involved. The bearing of that decision and the other decisions of this Court on the specific question of price announcements will be discussed on pages 279-287 below.

In the *Cement* case (*Cement Manufacturers Association* v. *United States*, 268 U. S. 588), this Court again upheld the principle of open and informed competition:

> "Nor, for the reasons stated, can we regard the gathering and reporting of information, through the co-operation of the defendants in this case, with reference to production, price of cement in actual closed specific job contracts and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; *even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price*" (p. 604). (Italics ours.)

Furthermore, as a direct result of the daily exchange among the members of the Cement Association of full details of all "specific job contracts" (including prices, quantity sold, quantity shipped, etc.), coupled with an elaborate system of investigations, a general competitive practice of fulfilling, in times of rising prices, *padded and duplicated specific job contracts* secured by buyers at prices lower than the manufacturers' current selling prices, was largely eliminated from the industry. In rejecting the contention of the Government that the activities of the Association constituted an undue and unreasonable restraint of "legitimate competition", this Court expressly held that:

> " * * * the gathering and dissemination of information which will enable sellers to prevent the perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon commerce, *even though in the ordinary course of business most sellers would act on the information and refuse to make deliveries for which they were not legally bound*" (pp. 603-4). (Italics ours.)

In short, this Court thus definitely upheld the right of competitors to cooperate to protect themselves against imposition, misrepresentation and fraud, *even though they thereby concertedly restrict a type of competition which they had long practiced and which was not shown to be in any way harmful to the public.* This specific application of the sound policy of upholding restraints of competition which had a reasonable basis was also exemplified in the *Chicago Board of Trade* case, *supra,* where this Court sustained an *express agreement* of all the competitors in the market to *eliminate completely a long-established type of competition,* not because it involved imposition or fraud upon themselves or others, and not because it was shown to be harmful or destructive competition, *but because it was shown not to be as wholesome and beneficial as the type of competition which was substituted for it by agreement of the competitors.*

The *Appalachian* Case.

The principles declared by this Court in the cases above cited were clearly and unequivocally reaffirmed in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. In the *Appalachian* case this Court stated:

> *" * * * A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade"* (pp. 373-4). (Italics ours.)

It is to be noted that "the evidence did not show the existence of any trade war or widespread fraudulent conduct" (p. 363), and various practices, the suppression of which by cooperative effort of the industry was commended by this Court were not fraudulent in nature, but were merely uneconomic and productive of "abnormal and destructive competition which depresses the price" of coal to the consumers.

The foregoing review of the decisions of this Court which deal with any aspect of the question of open prices and open competition makes it clear that this Court has always approved the policy of open prices and open competition, and that it has never condemned any practice in that connection except certain practices in the *Hardwood* and *Linseed* cases which were not "open prices" or "open competition" at all, but were mere price fixing schemes falsely masquerading under the name of "open competi-

tion", with secret exchange of price information among the sellers to aid them in their conspiracy against the buyers.

In the *Maple Flooring* and *Cement* cases, this Court approved systems of exchange of price and other trade information and practices of trade discussion and cooperation which were designed to eliminate fraudulent and wasteful practices, and to promote more intelligent and economic competition, and which in many respects were more far-reaching than those of the Sugar Institute. In the *Chicago Board of Trade* case, this Court approved a very substantial and direct limitation on price competition in order to force competition into the *open*. In the *Appalachian* case, this Court reaffirmed the principles declared in the *Maple Flooring*, *Cement* and *Board of Trade* cases, and specifically approved concerted action by competitors to eliminate not merely unfair and fraudulent and wasteful practices, but also practices which amounted to "abnormal and destructive competition which depresses the price" of coal.

The decisions of this Court in this series of cases, in principle and effect, fully sustain the legality of the activities of the Sugar Institute in abolishing secret concessions and discriminatory practices and promoting openness of prices and competition.

(2) Section 2 of the Clayton Act condemns the type of secret discriminations that were practiced in the sugar industry before the Institute was formed, and the concert of action involved in the adoption and observance of this fundamental Code provision represents the only effective way of giving practical effect to the express mandate and the underlying policy of that Section.

Section 2 of the Clayton Act reads as follows:

> "Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such

commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

Appellants contend that the policy of selling only at publicly announced prices is aimed against the same evil of price discrimination as Section 2 of the Clayton Act and affords the only efficient means of giving effect to the policy of that Section. The basic provision of Section 2 is a condemnation of discrimination in price between purchasers of the same commodity from the same seller.

At the trial counsel for the Government argued strenuously against this construction of the Act, contending in substance that discrimination in prices and terms between customers was a desirable form of competition and was protected by the Act. We shall now address ourselves to that question.

The obvious purpose of Section 2 is twofold: First, to prevent the use of discriminatory prices as a method of destructive competition between *sellers;* second, to prevent the destruction or impairment of competition between the *buyers* resulting from some buyers being placed at an unfair disadvantage in their own competition with other buyers who purchase from the seller at a discriminatory lower price.

That the Section includes the latter objective as one of its two major purposes was definitely ruled in *Van Camp & Sons Company* v. *American Can Co.,* 278 U. S. 245, 254, holding that when the Section condemns discrimination the effect of which may be to substantially lessen competition or create a monopoly "in any line of commerce", the words, "in any line of commerce" include the line of commerce in which the *purchasers* from the discriminator are engaged no less than that in which the discriminator is engaged himself. The *Van Camp* case is also on its facts a square holding to the effect that a mere showing of price discrimination is in itself sufficient, without more, to bring a case within the prohibition of the Section, unless one or more of the grounds of justification is *affirmatively* established.

This point was explicitly ruled in the subsequent case of *American Can Co.* v. *Ladoga Canning Co.,* (C. C. A. 7th Circuit 1930), 44 Fed. (2d) 763, (certiorari denied, 282 U. S. 899), where the Court said at page 768:

> "* * * the burden was on the defendant to establish its justification in view of plaintiff's showing that a price discrimination was given * * *."

With regard to the statutory provision requiring that "the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly", two points are to be noted:

1. In the first place, the requirement is as to effect and not as to purpose. Prohibition of discrimination is *not* limited to cases where it is used for the *purpose* of lessening competition, but extends to all cases, where, whatever the purpose, it may have a certain effect. The Section is not aimed merely at the malicious competition which seeks to destroy a particular rival. If it had been the intention of the framers of the statute to restrict its operation to "malicious competition" it would have been easy for them to find appropriate language to do so; in the absence of such restrictive language the statute must be construed as meaning what it says and as condemning all discrimination, irrespective of purpose or motive, which produces or tends to produce a certain effect.

2. In the second place, it is to be noted that this effect, which the statute requires, is that the discrimination *may* lessen competition. While this language is, of course, not intended to cover the bare possibility of a lessening of competition, it reaches all discrimination which involves a reasonable probability of that result, (*Standard Fashion Co.* v. *Magrane-Houston Co.* (1921), 258 U. S. 346, at 356-7), without requiring that such result need necessarily be proved. So far as concerns competition among the buyers of an article who propose to resell it, it is not open to argument that where one buyer can obtain goods from a seller at a substantial rebate while another must pay the full price, the former not only *may be,* or *probably will be,* but actually and necessarily *is* placed at a purely arbitrary competitive advantage which is bound to lessen competition by making it obviously disadvantageous for the competitor not thus favored to push the sale of the goods. Laboring under this unfair handicap, he will either become an unwilling seller of the goods, thus discouraging their dis-

tribution, or will withdraw or be driven out of the line of business in question altogether.

This is the result which must inevitably ensue, and that it was the result which actually ensued from the discriminations prevalent in the sugar refining industry prior to the formation of the Institute is clear from the review of the facts on pages 18 to 23 of this brief. In the sugar trade these discriminatory practices were not only fraught with the probability of lessened competition in the wholesale and retail trade, but had actually produced such a condition of restricted competition on a wide scale.

Evidence showing the tendency of price discriminations to lessen competition and create monopoly is hardly necessary. Such a tendency is the inevitable result of a system of arbitrary discriminations among purchasers whereby one purchaser is enabled to buy an article for so much less than his competitor that he can resell it at or below the price his competitor must pay for it. With a commodity like sugar, a "loss leader", frequently resold at a price which does not repay handling charges, such a discriminatory advantage is so decisive and complete that it must inevitably destroy the power of the unfortunate victims of the discrimination to compete. How such discriminations actually operate to lessen competition is clearly described by the Circuit Court of Appeals in *American Can Co.* v. *Ladoga Canning Co., supra,* as follows:

> "*4. Lessening Competition.* Little need be said on this question. The figures all too clearly show that the discrimination, not only might have substantially lessened competition, but did help Van Camp drive out its competitors. Van Camp's business increased rapidly. For the five years preceding the making of this contract, its business re-

> mained almost at a standstill. Five years after the contract was made, its business had increased 300 per cent. This increase was much more rapid than that of the canned goods business of the country during the same years. True, this increase might have been due to superior ability, greater ingenuity, and more aggressive methods on the part of Van Camp. But the figures are also present from which the jury might have concluded that the increased business following the contract of 1921 was due to the advantages which Van Camp obtained in the way of prices from defendant" (p. 768).

Just as competition was in this way restricted among the *customers* of the refiners, so it is obvious that price discrimination of the kind practiced in the sugar refining industry before the Institute necessarily lessens competition among the refiners themselves. While competition in the sense of mere rivalry may for the time being not be diminished by the prevalence of price discriminations, competition in the true economic sense of rivalry which produces results beneficial to the public is seriously impaired in its operation. In the long run, even competition in the sense of mere rivalry is diminished because of the inevitable tendency of a regime of price discrimination to destroy prematurely and unnecessarily the smaller and financially weaker competitors. These may not necessarily be the less efficient ones, and their elimination not only reduces the number of competitors, but often destroys the most efficient ones, when they are just developing and have not yet acquired finanacial strength.

In view of the statutory provision which requires only that price discrimination shall *probably* lessen competition to make it unlawful, it is clear from what has just been said

that the statute outlaws practically all discrimination used as a regular competitive method and permits only exceptional cases of discrimination, which, because of their unusual nature, do not threaten the normal functioning of the competitive system, and which, since they therefore do not come into conflict with the policy of the Section, there is no reason for prohibiting when they are called for by business convenience. Such a case, for example, might be sales made on the dissolution or winding up of a business, sales made to charitable or educational institutions and the like.

Special Grounds Justifying Discriminations. Turning to the special grounds of justification established by the Section to remove discriminations or supposed discriminations from its prohibition, it is first to be noted that at least three of the five enumerated classes of discriminations which are expressly excepted are not in any proper sense cases of true discrimination at all. These are (i) "discrimination in price on account of differences in the *grade* of the commodity"; (ii) discrimination in price on account of differences in the *quality* of the commodity sold; and (iii) discriminations which amount only to an allowance for differences in the *cost of selling or transportation.* Obviously, where articles are of different grade or quality, they are not "the same article" in the sense in which the normal functioning of competition results in a uniform price for the same article when sold at the same time and under similar conditions in the same market. They are substantially different articles, and if different prices are charged for them, there is, or should be, no proper question of discrimination. Similarly, where the cost of putting an article in the hands of one buyer can be identified as higher

than the cost of putting the same article in the hands of another buyer because of the addition of greater selling or transportation charges in the one case than in the other, there is no proper question of discrimination since in the two cases the article is not sold under similar conditions in the same market.

It will be noted that the condemnation of "discriminations" in the Institute Code has never been construed as including differences in price on account of grade, quality or cost of selling or transportation. Such differences have always been reflected in the published grade and package differentials and freight applications of the refiners since the Institute. Under Institute practice, the "discriminations" condemned by the Code are ***real*** discriminations—those involving arbitrary, unfair and secret allowances to favored customers, based on no differences in cost to the refiners, and placing their other customers at a competitive disadvantage.

"Quantity" Discounts. With respect to the statutory justification of discrimination "based on differences in the *quantity* of the commodity sold", it is again to be noted that such "discriminations", in so far as they are true "quantity discounts", are not properly discriminations at all, since they but reflect and pass on to the purchaser actual differences in cost of production or sale as between goods manufactured and sold in large orders and the same class of articles manufactured and sold in small orders. Where there are such differences in cost between filling large orders of the commodity and small orders, there are in effect, from the economic standpoint, two separate kinds of commodity offered for sale, and the fact that one of them is offered at a different price from the other does not amount to a true discrimination.

Where, on the other hand, as in the sugar industry, the nature of the commodity sold or the method of its manufacture and sale do not thus result in making large-quantity sales any less expensive than an equivalent volume of small sales (pp. 107 to 114, *supra*), and where in consequence a discount or lower price based on a difference in quantity does not reflect any saving to the seller, the allowance of such a discount to large purchasers *does* amount to a discrimination in the proper sense of the word.

Even if the proviso of the Section were to be construed as broad enough to cover discrimination based on quantity where quantity sales do *not* involve any difference in cost, it is submitted that the Section clearly does not legalize such discrimination in the sense of bringing it fully and absolutely within the protection of the law, but merely operates, if at all, to prevent a proceeding based on the Section from being successfully prosecuted against such discrimination. In other words, the restrictive provisions of Section 2 do not confer the affirmative protection of law on price discrimination of any character. They merely except from the prohibition of the Section and the penalties provided by the Act certain types of price *differences* which are not actual *discriminations*.

Discriminations to Meet Competition. The purpose and nature of the provision which excepts from the prohibition of the Section "discrimination in price * * * made in good faith to meet competition" is obviously different from that of the other exceptions. It covers presumably any and every kind of price discrimination if only actuated by a certain motive or purpose, viz., if "made in good faith to

meet competition". The most elementary analysis discloses some ambiguity in the phrase "to meet competition".

If price discrimination is removed from the prohibition of Section 2 by the mere fact that it is actuated by the purpose of taking business away from one's competitors, then obviously the whole of Section 2 might as well be blotted from the statute books, since there is no price discrimination not actuated by that purpose. The prohibition of the Section becomes wholly nugatory if it means that a competitor who offers a discriminatory lower price to a purchaser in order to take the business of that purchaser away from another competitor is discriminating "in good faith to meet competition", and may on that ground justify his discrimination. If any force and virtue is to be left to Section 2 at all, the exception in favor of "meeting competition" must be construed to exclude the case of a competitor who *initiates* discriminatory prices to take business from his rivals, and to authorize price discrimination only to *meet* competition which itself consists of initiating discriminatory prices. This result is no doubt implicit in the word "meet", but it becomes conclusive if the practical consequences of the alternative construction are clearly envisaged.

Thus, only in one case does the statute mark out and except from its condemnation a real price discrimination—and that is in the case last considered, where such a discrimination is merely a response to, and retaliation against, a prior discrimination initiated by a competitor. The exemption from liability thus conferred upon a purely retaliatory discrimination can certainly not be taken as a statutory *approval* of discrimination of any kind or in any sense. It merely exempts from the penalties of the Act the use

of a particular weapon of defense against discrimination, viz., retaliatory self-help.

This recognition of the use of discrimination to repel unlawful discrimination can certainly not be taken as such a legal recognition of the lawfulness of the particular type of discrimination in question, i.e., *legalized retaliatory discrimination,* as to bring that type of discrimination within the scope of the competition which may not be restricted by concerted action; for it is to be noted that the very condition on which the law predicates its recognition of the legality of this *retaliatory discrimination* to meet competition is that there shall first be an instance of *unlawful discrimination.* If the prohibition of unlawful discrimination were so fully and effectively enforced as to completely prevent such discrimination, there would never arise an opportunity for the exercise of the privilege of lawful retaliatory discrimination. The privilege only exists to take care of the possible inadequacy of the prohibition. Under such circumstances, it cannot be argued that because the law recognizes the privilege, the privilege must at all costs be preserved by preserving the right to violate the law.

Where a type of competition thus depends for its lawfulness on the prior existence of unlawful competition, it is submitted that the former puts no barrier in the way of the lawfulness of a concert *to abolish the unlawful competition upon which it depends.* It is true that if competitors may lawfully concert to refrain from the practice of unlawful discrimination, they will thereby eliminate and abolish the occasion for resort to the privilege of retaliatory discrimination which the law allows. In doing so, however, they will only be giving greater effectiveness to the policy and purpose of the statute itself.

Congress, in enacting the prohibition of Section 2 of the Clayton Act against discrimination, could not assume, and properly did not assume, that the prohibition would in all cases be effective. It was therefore sound legislative policy to provide that the discrimination against which the statute was directed might also be discouraged and thwarted by resort to retaliatory self-help. In so far, however, as competitors by concerting to obey the statutory prohibition eliminate the occasion for resort to such self-help, they can surely not be said to be abolishing or restricting something which the statute safeguards. They are merely eliminating resort to one method of effectuating the statutory prohibition by substituting a more efficacious method.

It is to be noted in this connection that the privilege of retaliatory discrimination which Section 2 of the Clayton Act confers is a privilege conferred for the benefit of the competitors themselves who may wish to resort to it as a defense against unlawful competition. It is a privilege created and conferred for *their* benefit and not a normal competitive device safeguarded by the law for the benefit of the public as a part of the mechanism of wholesome competition in the public interest. The only interest which the public has in it is as a possible deterrent of the discriminatory competition against which it is directed. If some other and more effective deterrent is provided, the interest of the public is better served. The privilege of retaliatory discrimination being thus personal to, and for the benefit of, the competitors, it is submitted that no reason can be adduced why they should not, if they see fit, eliminate the occasion for exercising it by concerting to obey the statutory prohibition and thereby rendering the exercise of the privilege unnecessary and superfluous.

In short, it is submitted that concerted adherence by competitors to the practice of selling only on publicly announced prices equally available to all purchasers and without arbitrary discriminations is not an interference with any type of competition or competitive method protected by the Clayton Act, but is simply a concerted effort to obey the prohibition of Section 2 of that Act and does not go beyond concertedly refraining from what the Act itself prohibits.

Further Reasons Supporting Lawfulness of Concerted Action Against Discriminations. Appellants further contend (a) that such concert is essential as a practical matter to prevent competitors from exposing themselves involuntarily to liability for violations of Section 2; and (b) that it affords the only effective and reasonably adequate method of accomplishing the object and purpose of that Section.

(a) As already noted, the statute permits "discrimination made *in good faith to meet competition*". Clearly under the *Ladoga* case, *supra,* the burden is on the seller who gives a discriminatory price to one of his customers to show the existence of actual competition, and this is the only construction of the statute which would give to it any effective meaning. Three conditions must be established in order to justify the discrimination. First, competition must actually exist in the form of an offer of a discriminatory price by another competitor; second, the discrimination must be actually given to meet such an offer; and third, it must be given in good faith for the purpose of meeting such offer and for no ulterior or incidental purpose of lessening competition.

A competitor in an industry where it is well known that price discriminations are being widely sought and given is

in an almost impossible position. For him to give discriminatory price concessions himself exposes him in every instance in which such a concession is given to the danger of the penalties prescribed by the law, unless he might be able to sustain the burden of excusing or justifying his act by showing that he came within the exceptions of the statute. At the same time, he is without any assurance of being able to sustain this burden. He has no means of determining the actual existence of the competition he is asked to meet. He would seldom, if ever, have more than the statement of a customer seeking a concession that a similar concession was offered by a competitor. Even though he might believe the customer, he would have no way of proving the truth of the customer's statement. The business risk involved in such a situation is intolerable.

The sum and substance of such a situation is that so long as the practice of allowing discriminatory price concessions is, or is believed to be, prevalent in an industry, every competitor, no matter how good his intentions, runs a constant risk in every transaction of violating the law. He is caught between two fires. If he plays perfectly safe it is obvious that he will lose an increasing amount of business to competitors who are less careful of the law; if he is unwilling to incur this sacrifice, he is in constant danger of subjecting himself to heavy penalties and treble damage suits.

It seems clear that relief from such a situation is impossible through the separate action of individual competitors; the only way out is through concerted action which will save the law-abiding competitor from being exposed to loss by the illegal conduct of his less law-abiding competitors. It would seem a strange perversion of the Anti-Trust statutes to hold such concerted action an unlawful

restraint of trade where it affords the only practicable and effective method of avoiding inadvertent violations of an important provision of those statutes.

(b) Finally, concerted action by competing sellers to eliminate arbitrary price discriminations between purchasers through concerted refusal to sell otherwise than on publicly announced prices equally available to all, represents the only effective way of giving practical effect to the mandate of Section 2 of the Clayton Act. The intent and object of that Section is to suppress a particular business practice, namely, the sale of the same commodity to different purchasers at different prices without special justification, and to require the observance by business men of the contrary practice of selling the same commodity at the same price to all purchasers in the absence of such special justification. As demonstrated by the complete failure of the National Prohibition Act, it is impossible for law to secure adherence to a rule of social conduct solely through legally enforced penalties for violation. If such a law is to be effective it is essential that the rule of conduct which it prescribes shall have the effective support of *prevailing practice* among the great majority of those to whom the law applies.

(3) The practice of selling only on publicly announced prices and terms without secret discriminations in favor of particular purchasers is the only practical means of protecting both sellers and buyers from the widespread deception and fraud which are an inevitable part of the practice of secret price discriminations.

In a business situation where the openly announced prices of competitors cannot be accepted as the prices at

which they are actually selling, because of the knowledge of many of the purchasers that those prices are not adhered to and that special discriminatory prices are being given, it is impossible for any seller to know precisely the competition that he has to meet. If the customer of one competitor represents to the latter that he has been offered a special discriminatory price by another competitor, there is no way in which his statement can be verified. If, therefore, a customer believes that his business is sufficiently valuable to the producer with whom he is dealing to make that producer unwilling to lose it, he is under an almost irresistible temptation to try to obtain a special concession for himself by falsely representing that he has been offered a concession by another. Human nature being what it is, such attempts become common, with the result that a premium is placed on a dishonest business practice which cannot be checked so long as the condition persists which gives rise to it.

So long as a general condition of price discrimination prevails, with its invitation to fraud and misrepresentation, the burden and losses due to the frauds rest not merely on competing sellers of the article but on the buyers as well. Where the less scrupulous buyers take advantage of the opportunity to purchase the article at a special price concession obtained by misrepresentation, the more honest buyers, or buyers whose purchasing power is so relatively small that the sellers are not afraid to lose their business, are at an obvious disadvantage in their own competition with other buyers who can obtain secret price cuts. Inevitably the buyers who cannot obtain such cuts are taxed for the benefit of the buyers to whom the cuts are given, and are required to pay a higher price than would be fixed by the open and public competition of the market. Thus buyers no less

than sellers are unfairly deprived of equal opportunity. The honest buyer and the small buyer can be relieved from an unequal contest with the dishonest and the financially strong only by the concerted establishment of an open market where public prices prevail.

The conditions which prevailed in the sugar industry in this regard before the Institute was formed cried aloud for a remedy, and concerted action by the refiners to sell only on openly announced prices, without secret discrimination, was the only way to remedy it. That it is lawful for competing sellers to take concerted action to protect themselves, and indirectly their honest customers, against fraudulent and dishonest practices by altering the trade practices which give an opening to such dishonesty and fraud was expressly held by this Court in the *Cement* case, *supra*. That case is clear authority that concert for such purpose is not rendered illegal by the fact that it is financially advantageous to the parties to the concert or that the concert eliminates a practice which may result in lowering prices.

Section 5 of the Federal Trade Commission Act. Section 5 of the Federal Trade Commission Act which provides that "unfair methods of competition in commerce are hereby declared unlawful" has been most vigorously enforced against competitive practices *which involve fraud on or deception of the customer*. And wholesale fraud and deception practiced against customers is the very essence of price discrimination.

It is clearly established by the evidence in this case that the only way in which a system of price discriminations can be maintained in the sugar refining industry is by

misrepresenting the facts to all other buyers, concealing the concessions from them, and leading them to believe that such discriminations against them are not being practiced. This necessarily involves continued and flagrant violation of Section 5 of the Federal Trade Commission Act.

B.

THE STEPS TAKEN BY APPELLANTS TO GIVE EFFECT TO THE BASIC AGREEMENT THAT SUGAR SHOULD BE SOLD ONLY UPON OPEN PRICES AND TERMS WITHOUT DISCRIMINATION AMONG CUSTOMERS DID NOT CONSTITUTE AN UNDUE OR UNREASONABLE RESTRAINT OF TRADE.

1. The Price Reporting System.

The nature, purpose and effect of the price reporting system has been fully described in connection with our discussion of the facts (pp. 55 to 104, *supra*). As there stated and as established beyond dispute by all of the evidence in this case:

> (1) The price reported to the Institute is a price which has *already been publicly announced to the trade* by the reporting member.
>
> (2) The function of the Institute is merely to relay and give *further publicity* to the price announcement.
>
> (3) The Institute relays the announcement not merely to the competitors of the refiner making the announcement, but *to the entire trade, including*

buyers as well as sellers, through the most widely used public channels of trade information.

(4) No comment accompanied these relays and no price or production propaganda of any character was ever indulged in by the Institute, its officers or members.

Such a system is radically different from the "Price Reporting Plan" involved in the *Hardwood* and *Linseed* cases, the cornerstone of which was *price and production propaganda* and the *secret exchange of price information among the sellers to aid them in their conspiracy against the buyers* (pp. 252-6, *supra*). The price reporting system followed by the refiners is, it is submitted, clearly lawful under the decisions of this Court in the *Maple Flooring* and *Cement* cases.

In the *Maple Flooring* case, the members reported weekly to the Secretary of the Association all sales made during the preceding week, showing the date, quantity, grade and price of each sale, the name of the purchaser, and the rate of commission paid, if any. The Association reported back to the members the information so received as to quantities, grades and prices with respect to each sale, but the names of the purchasers were not reported back. The information exchanged was of an intimate and detailed character relating to specific transactions, in contrast to the *purely general information as to already published prices transmitted to the Sugar Institute.* While the information reported in the *Maple Flooring* case was as to *past* transactions, there is no intimation in the opinion of this Court that the reporting to the Association of general price lists *which had already been published by the members* would

have been illegal. As we have seen in the case at bar (pp. 55-9, *supra*) all that was done here was to report to the Institute, for relay to the trade and public, prices and terms which had *already* been made public by the refiners' own individual announcement, in the manner to which they had always been accustomed. In the *Maple Flooring* case this Court not only upheld the exchange of information as to prices in *particular* transactions, but based its conclusion partly upon the fact that the information was reported for the purpose of giving it publicity through the trade.

In the *Cement* case this Court upheld as legal an exchange of information regarding specific outstanding contracts not yet fulfilled, describing in detail the contract and giving the name and address of the purchaser, the amount, price and delivery point. There was also a requirement of detailed reports of all changes in the contract. Here was obviously an exchange of information as to prices in particular transactions still current and yet the exchange was held legal because it merely gave additional, though more detailed, publicity to price information already substantially known to the trade.

The results of the four cases may be summarized as follows:

> (a) An exchange of information as to prices in particular past transactions is illegal where the information is to be kept private among the members of the Association and where the exchange is coupled with other practices indicating that it is part of a scheme for the enhancement of prices by private consultation (*Hardwood* and *Linseed* cases); but is legal where it is not shown that it is part of such a scheme and where the information so ex-

changed is given general publicity (*Maple Flooring* case).

(b) An exchange of confidential information among sellers as to prices quoted for specific future transactions, where such prices are not open and public but are special private concessions to particular customers, is unlawful as amounting to an unfair combination of sellers against buyers (*Linseed* case).

(c) An exchange of information regarding special private prices in specific outstanding transactions is lawful where the purpose of the exchange is a reasonable and proper one, such as the giving of additional publicity to price information already substantially known to the trade (*Cement* case).

It is submitted that no case ever decided by this Court affords any basis whatsoever for a contention that the mere reporting of *already public price announcements to a central agency in the industry for the purpose of giving them wider publicity* is in any respect unlawful.

Publishing Prices Before Sales. Counsel for the Government in the trial below strenuously contended that the decision of this Court in the *Maple Flooring* case was to be construed as disapproving concerted action to publish prices *before* sales. We cannot conceive that this Court had any such intention. No such practice was there involved, and therefore it could not have been the intention of this Court to disapprove it. The pertinent language of the Court was as follows:

"*We decide only* that trade associations or combinations of persons or corporations which openly

> and fairly gather and disseminate information as to the cost of their product, the volume of production, *the actual price which the product has brought in past transactions,* stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption, as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce" (268 U. S. 563, at 586). (Italics ours.)

To us the foregoing language means simply that this Court limited its decision to the facts before it. The words of the Opinion carry no implication that this Court looked or would look with disfavor upon concerted action to announce prices *before* sales. On the contrary, it seems to us that the reasoning of this Court in both the *Maple Flooring* and *Cement* decisions leads inevitably to the approval of the public announcement of prices *before* sales, under a state of facts like those in the case at bar.

As we have seen, there is not even a *suspicion* that the appellants used their price reporting plan as a means of agreeing upon prices. The Trial Court fully absolved the appellants from any such suspicion in the following Finding:

> "201. I find no agreement among defendants on basis prices in the sense of an agreement to adopt a certain basis price from time to time and to maintain it during any period. Frequently an announcement by one refiner of an *advance* would result in a series of announcements by others, ultimately leading to a *decline*. Often, too, *the advance would be*

> *withdrawn* because one refiner would refrain from following the announcement. Except in few instances, *a decline announcement was followed by all*" (R. 310). (Italics ours.)

Nor was the announcement of prices before sales used as a means of attempting to persuade any refiner to change his price or to follow an advance. Here again the Trial Court absolves the appellants from any such suspicion. His Finding on this point is as follows:

> "48. I find that the refiners did not consult with one another after an advance had been announced by one of them and that the grace period was not in fact used by them to persuade a reluctant member to follow the example set, despite the business necessity of withdrawing an advance unless it were followed by all" (R. 277).

These Findings leave for consideration the naked question whether there is, in the concerted practice of announcing prices before sales, any such inherent tendency to restrain or suppress competition as to require that it be held unlawful under the Sherman Act. For all of the reasons set forth in our discussion of this question on pages 62 to 104, *supra,* we submit that this practice as carried on in the case at bar, in a trade like the sugar trade, *promotes* free and wholesome and economic competition, instead of suppressing or restraining it, and it is therefore clearly lawful.

It may be that in some other industries, selling products which are not standardized, so that price competition cannot immediately express itself with full force when a competitor has announced his prices before sales, it might be argued that announcing the prices after sales would be

preferable, but we can see no soundness in such an argument even then. In the *Steel* case (pp. 250-1, *supra*), where the Company's practice was to "publicly announce its prices, to adhere to them with all buyers alike, and to give timely notice of its purpose to change them", this Court approved the practice as a sound and wholesome one.

It may be also that when competitors agree that they will not *reduce* their prices without announcing the decline some considerable time before it becomes effective, there is present some element of restraint upon competition. Such a price announcement practice was prescribed by some of the N. R. A. Codes and was commonly called the "waiting time" practice. Obviously, such a practice would give opportunity for persuasive pressure to be brought to bear upon a competitor announcing a decline to withdraw the announcement, and under such circumstances competition might be restrained. But in the case at bar, as to price declines, no waiting time at all was called for by any rule or observed in practice. As found by the Court (Finding 44, R. 275-6), price declines were not only instantly effective, but it was the practice to make such declines effective on all business entered on the day of the decline, even when the decline had not been announced until late in the day, and this practice was approved by an Institute Code Interpretation (R. 276). Furthermore, as we have seen (pp. 59-61, *supra*), the refiners sometimes repriced all business entered for weeks before a price decline. This is therefore the exact reverse of a "waiting time" practice.

As to price advances, it is true that it was the practice of the refiners, approved by a recommendation of the Institute, to announce such advances by 3 o'clock of the day before the advance. But, as we have seen (pp. 48-68,

supra), the prior announcement of price advances was not due to the Sugar Institute. It was a part of the sugar move system and had always been the practice in the industry. The so-called "Three O'Clock Rule" read as follows:

> "Except to meet a competitive price already announced, the Institute recommends to its members that they announce changes in prices not later than 3:00 o'clock. Such timely announcement will enable a price change to receive wide publication through the evening and morning papers. It is, furthermore, in the interests of uniformity which will be appreciated by the trade" (R. 276).

As the Trial Court found:

> "47. The effect of the Three O'Clock Rule in and of itself, seems to have been advantageous to the trade in case of a price advance in that the uncertain period of grace has been replaced by a definite one" (R. 277).

It is obvious, of course, that the prior announcement of price advances is an advantage to the buyers, especially when it is practiced as in the sugar industry for the specific purpose of giving customers a reasonable time within which to place their orders for as large a supply of sugar as they want to buy at a present lower price before the advance becomes effective. This practice was no part of any scheme to restrain competition. On the contrary, as the Trial Court itself found, there was no consultation among the appellants, and "frequently an announcement by one refiner of an advance would result in a series of announcements by others, ultimately leading to a decline. Often, too, the advance would be withdrawn, because one refiner would refrain from following the announcement. Except

in a few instances, a decline announcement was followed by all" (Findings 48 and 201, R. 277 and 310).

This, we submit, is open competition at its best, and upon the state of facts here presented, there can be no reason whatsoever for holding such a price announcement practice unlawful.

2. Quantity Discounts.

The justification for the adoption and observance by the refiners of Section 2 of the Code of Ethics, relating to quantity discounts, is based upon the special facts of the sugar refining industry reviewed at length at pages 105 to 124 of this brief, and upon the ground that in such an industry, subject to the special conditions and surrounding circumstances, quantity discounts inevitably amount to, and can only amount to, discriminatory and arbitrary price concessions. Their abolition by the action of the competitors is therefore a proper and necessary means of eliminating a destructive and uneconomic competitive method, and is justified as a method of giving effect to the Code condemnation of price discrimination between customers.

Since, under the conditions obtaining in the sugar refining industry, sales in large quantity units and sales to purchasers who buy a relatively large quantity of sugar during the year do not result in any saving in either direct or indirect costs to the refiner, it is submitted that quantity discounts would amount to no more than bare price discriminations, and as such were properly condemned by the Code of Ethics and refused by the refiners.

While the language of Section 2 of the Clayton Act makes a special case of quantity discounts to the extent

of permitting them *to be set up in justification by an appellant charged with price discrimination,* it is submitted that this provision of the Act does not amount to a general declaration that quantity discounts of any and every sort are always and under all circumstances protected by law, but serves at most to save an appellant from special liability under the Clayton Act. Furthermore it does this only (i) where the discrimination takes the form of a discount based on, and graded according to, the quantity of the commodity purchased; and (ii) where the discount is one which represents a corresponding economic saving to the seller who gives the discount.

It is submitted that the Clayton Act when it refers to "discrimination in price * * * on account of differences in * * * quantity of the commodity sold" refers not to mere arbitrary rebates to large customers varying in amount and bearing no fixed proportion to the quantity purchased, but has reference to an orderly gradation of price corresponding to different quantities and available to all customers buying the article in the quantity designated in any particular discount bracket. This is plainly indicated by the language of the Court in *American Can Co.* v. *Ladoga Canning Co., supra,* where it is said:

> " * * * But if the volume of Van Camp's business was the basis of reduced prices, should not such prices have been available to all customers who bought cans of like amount? Were not all canners entitled to know the amount of purchases necessary to obtain the saving in cost of cans? * * * Ordinarily a manufacturer, in fixing prices based on volume of business, would publish a price list from which all customers would learn the amount of purchases necessary to secure the best prices" (p. 767).

As found by the Trial Court (Finding 24, R. 270), the discounts and rebates given before the formation of the Institute were given to some large customers but not to all; they bore no definite relation to the quantities purchased, and they were not openly available so that, in the language of the Court in the *American Can* case above quoted, "all customers could learn the amount of purchases necessary to secure the best prices". They were purely arbitrary in the sense that they resulted from secret bargaining in each transaction and in no sense did they meet the requirement that all purchasers "were entitled to know the amount of purchases necessary to obtain the saving". It must always be remembered in construing the provisions of the Code of Ethics of the Institute that they were directed to practices prevailing in the sugar refining industry and not to a purely abstract situation. The condemnation of quantity discounts was aimed at the kind of discounts which had made their appearance in the sugar industry and not at an orderly system of graded discounts corresponding to reductions in cost which might fall within the proviso of Section 2 of the Clayton Act.

Furthermore, appellants contend that the proviso of Section 2 does not throw the protection of the law for all purposes about discounts given to large buyers where the discount represents no saving in cost to the seller, and so must be charged up to other purchasers, thus amounting to a vehicle for an essentially uneconomic and uncompetitive type of price discrimination. That the quantity discounts excepted from the prohibition of Section 2 are discounts representing a saving in cost seems clearly to have been the understanding of the Court in the *Ladoga* case, *supra,* where it spoke of such discounts as

> "* * * price concessions to large consumers whose large demands make output more constant and thus lessen costs."

Conceding, however, that possibly even a quantity discount not representing a saving in cost might serve to except the person giving the discount from the penalties for violation of Section 2, appellants submit that in view of the policy of the statute against purely arbitrary discrimination, and in view of the policy of the Anti-Trust laws against rivalry which menaces true economic competition, it follows that concert to abolish purely arbitrary "pseudo" quantity discounts representing no saving in costs is not prohibited by law. Appellants contend that it is against this uneconomic and uncompetitive type of quantity discount that the condemnation contained in the Code of Ethics of the Institute is directed, and that the provision of the Code is justified in the sugar refining industry because large sales on a single order and sales of large quantities over a given period to the same purchaser do not effect a saving, direct or indirect, to the refiner.

3. Regulations Affecting Brokers and Warehousemen.

The Trial Court has held that the action taken by the refiners, pursuant to Institute recommendation, in requiring that in the handling of their sugar the inconsistent and incompatible offices of broker and warehouseman be kept separate from each other and from the merchandising of sugar, in requiring their broker and warehouseman agents to sign non-rebating agreements and in requiring their broker agents to observe the provisions of the Code of Ethics, constitutes an undue and unreasonable restraint of trade.

In view of the functions performed by the broker and the warehouseman in the marketing of refined sugar, which

have previously been described at length (pp. 127-134), it is clear that the prevention of price discriminations and departures from the policy of open prices publicly announced would be utterly impossible if the refiners were unable to rely upon the observance of that policy by the brokers and warehousemen employed by them and their competitors.

Both the broker and the warehouseman are essential and integral links in each refiner's conduct of his business. He cannot conduct his business in conformity with the principles to which he has subscribed unless he can control the conduct of the brokers and warehousemen whom he employs. If the refiners themselves may lawfully undertake to observe in concert the principles embodied in the Code, there can be no lawful objection to their concerted adoption of reasonable measures designed to prevent the frustration of these principles by the acts of their own agents.

The action taken by the refiners was, it is submitted, clearly justified as reasonably necessary to secure the impartial and disinterested services of their own agents and to protect themselves against the unfair, dishonest and fraudulent practices of brokers and warehousemen shown by the evidence in this case and found by the Trial Court.

The regulations adopted and observed by the refiners and condemned by the Trial Court constituted a reasonable and proper method of preventing their dealings with brokers and warehousemen from being converted against their will into a channel or instrumentality for the violation of the Code and for the commission of frauds against the refiners. They cannot, it is submitted, be regarded as unlawful under any principle which can be derived from those decisions dealing with unlawful boycotting or blacklisting.

Not a Secondary Boycott.

The action taken by the refiners does not, as contended below by the Government, amount to a secondary boycott, *i. e.*, a concerted refusal by a group to deal with a particular individual, not for the purpose of causing that individual to conform to some standard laid down by the group and in which they have a direct and legitimate interest, but for the purpose of compelling the individual to refuse to deal with some third person—and which according to some authorities is always illegal *per se*.

A primary boycott, *i. e.*, a concerted refusal by a group to deal with a particular individual for the purpose of causing that individual to conform to some standard of conduct desired by the group and immediately affecting some interest of theirs, is lawful or unlawful, depending upon whether the conduct which the boycott is designed to bring about is conduct which the group is reasonably and properly interested in having brought about.

Even if there is any element of a primary boycott in the refiners' refusal to deal with brokers or warehousemen whose conduct or method of doing business promotes or cloaks violations of the principles to which the refiners had subscribed or encourages frauds against the refiners themselves, such a policy is clearly justified in the light of the conditions which it was designed to correct.

4. Miscellaneous activities designed to render effective the basic agreement that sugar should be sold only upon open prices and terms without discrimination among customers.

The action taken by the refiners (1) in refusing to deal with water carriers who refused to announce openly their

rates and terms or who violated their openly announced rates and terms by the granting of rebates or concessions, (2) in guarding against participation by buyers, brokers or warehousemen in rates paid by refiners on shipments of their own sugar by private charter, and (3) in refusing to deal with trucking concerns affiliated with buyers, brokers or warehousemen or trucking concerns unwilling to sign non-rebating agreements, was, it is submitted, clearly justified under the same principles as those discussed in detail in connection with the subject of regulations affecting brokers and warehousemen. The measures taken were both appropriate and necessary to prevent violation by the refiners' own agents of the basic principle of open prices and terms without discrimination among customers.

Transiting and diversion for the purpose and with the effect of defeating the refiners' openly announced freight applications obviously involve a fraud upon the refiner if done without his consent, and, if consented to by the refiner, equally clearly involve a violation of the basic principle of open prices and terms, without discrimination among customers. In either event, the action taken by the refiners was, it is submitted, clearly justified for the reasons set forth in our discussion of the legality of the basic principle.

Similarly, the recommendations made by the Institute and the action taken by the refiners with respect to such subjects as tolling contracts, used bags, private brands, long-term contracts, pool cars and cargoes and the like were, it is submitted, entirely proper and lawful as reasonably necessary and appropriate to give effect to the basic principle. In connection with each of these subjects, there existed opportunities for discriminatory practices, which, un-

less guarded against, would have nullified in large part the carrying out of the basic principle adopted by the refiners. For the reasons developed at length in our discussion of the facts, all of these subjects constituted vehicles for the granting of "smokeless rebates". Unless the refiner's practice with respect to each of these subjects was openly announced and his terms and conditions made equally available to all of his customers, discrimination was inevitable. The granting of special terms and conditions with respect to these subjects to some but not all of his customers amounted to a preferential treatment equivalent to the granting of a straight rebate or price concession. If the refiners were justified in refusing to grant discriminatory price concessions to favored customers, they were, it is submitted, equally justified in refusing to grant to favored customers special terms and conditions which they did not or could not, as a practical matter, grant to all of their customers without discrimination.

C.

THE ACTIVITIES OF DEFENDANTS DESIGNED TO EFFECT MORE ECONOMIC METHODS OF PRODUCTION AND DISTRIBUTION DID NOT CONSTITUTE AN UNDUE OR UNREASONABLE RESTRAINT OF TRADE.

The activities of this type held by the Trial Court to constitute an unlawful restraint of trade consisted of the exchange of certain statistical information not disseminated among the purchasing trade at large and the elimination of various consignment points throughout the country. Both activities were, it is submitted, entirely lawful and proper under the principles laid down by this Court in

the *Maple Flooring, Cement* and *Appalachian Coals* cases, *supra*.

The collection and dissemination of statistical information by the Institute is condemned by the Trial Court solely on the ground that buyers were prejudiced by their failure to receive all of the information collected by the Institute and disseminated among the refiners.

That the statistical information which the Institute failed to make generally available to the purchasing trade was of no interest or value whatsoever to buyers and that buyers were in no way prejudiced by their failure to receive such information is, it is submitted, clearly established by the evidence reviewed in connection with our discussion of the facts. In the absence of such prejudice there can be no reason for condemning either the statistical activities of the appellants, or their failure to give *all* of such statistics to the buyers. The statistical information gathered and disseminated by the appellants served to promote intelligent and economic competition.

The elimination of unnecessary consignment points throughout the country constituted, in a sense, a "restraint" of competition. The type of competition thus restrained, however, was, as shown by our discussion of the facts, wasteful and uneconomic, productive of no real benefit to the purchasing trade.

The unnecessary duplication and multiplication of consignment points at a tremendous cost to the industry, a cost ultimately borne by the buying public, is not, we submit, the type of competition beneficial to the public interest, which the Anti-Trust Laws were designed to foster and protect.

CONCLUSION.

The fundamental issue presented for decision in this case is whether competitors may, without violation of the Sherman Anti-Trust Act, take such concerted and effective action as is necessary to avoid wasteful methods, to protect themselves against fraudulent and dishonest practices, to abolish unfair and secret discriminations, and to promote open and economic competition.

The activities of the Appellants which are under review here were undertaken, with the approval of the Attorney General of the United States, in an honest endeavor to accomplish the foregoing purposes. We believe the kind of competition fostered by the activities of the Sugar Institute is the kind of competition the Sherman Act is intended to protect, and that it would defeat the purposes of the Act to hold such activities unlawful.

If the Act is held to forbid such activities as those of the Sugar Institute, effective concerted action to remedy the abuses of unfair, dishonest and uneconomic competition will be rendered impossible, and the business and industry of the country must be surrendered to all the evils which are inherent in the system of secret discriminations and fraudulent and wasteful practices which afflicted the sugar trade before the Institute was organized.

For the reasons above stated and upon the authority of the cases cited, it is respectfully submitted that the decree of the District Court should be reversed in the particulars assigned as error in this brief.

JOHN C. HIGGINS,
Solicitor for Appellants.

SULLIVAN & CROMWELL,
EDWARD J. MCGRATTY, JR.,
Of Counsel.